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REPORTS OF CASES

ARGUED AND RULED AT

NISI PRIUS,

IN THE COURTS OF

Kings Bench, Common Pleas, & Exchequer;

TOGETHER WITH CASES TRIED ON

The Circuits,

AND IN

The Central Criminal Court:

FROM

HILARY TERM, 3 WILL. IV., TO HILARY TERM, 5 WILL. IV.

By F. A. CARRINGTON & J. PAYNE, Esqs.

OF LINCOLN'S INN, BARRISTERS AT LAW.

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CASES

AT

NISI PRIUS.

COURT OF KING'S BENCH.

Adjourned Sittings in London, after Hilary Term, 1833.

BEFORE LORD CHIEF JUSTICE DENMAN.

SWETE, Esq., v. FAIRLIE, Esq., and Another.

THE declaration stated, that the plaintiff, on the 31st of May, 1827, effected a policy in the Globe Insurance Office, by which that Office undertook, that, if T. A., Esq., should die within one year, they would pay 5000*l.*; that the defendants signed the policy, and that it had been kept up by annual payments. It then averred that the plaintiff was interested in the life of T. A.; and that, while the policy was in force, to wit, in April, 1830, T. A. died, yet the defendants refused to pay the insurance. Plea—the general issue.

It appeared, that, on the 30th of April, 1827, the plaintiff, who had contracted for the purchase of an estate dependant upon the life of Mr. Thomas Abraham, applied to the agent of the Globe Office, at Exeter, to effect an insurance for 5000*l.* Two temporary insurances for fourteen days each were made at Exeter, and in the meantime the usual forms were forwarded to Mr. Abraham in town; and, in reply to the question whether he was “afflicted with gout, fits, asthma, or any other disorder tending to

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A policy of insurance on the life of another person, who, at the time of the insurance, is in a good state of health, is not vitiated by the non-communication by such person of the fact of his having, a few years before, been afflicted with a disorder tending to shorten life, if it appear that the disorder was of such a character as to prevent the party from being conscious of what had happened to him while suffering under it.

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shorten human life," he wrote as follows:—"Neither: occasional indigestion only.—Thos. Abraham." Mr. Abraham also appeared before the directors at the office in London. He also referred to Mr. Vance, a surgeon, Mr. George Long, and Mr. Grindall. Mr. Vance wrote to the office as follows:—"I have known Mr. Abraham for the last three years. I have, on two or three occasions, given him a little advice for slight gastric disturbance, but I believe him to be a very healthy, strong man; and I am not acquainted with any personal imperfection, or with any habits of life which should induce me to give you any caution as to insuring his life at your office," &c. It appeared that one of the directors of the Globe wrote as follows:—"I know Mr. Abraham very well, and should consider him quite an unexceptionable life." On the part of the plaintiff, several members of Mr. Abraham's family, several gentlemen of the bar who had been his pupils, and others who knew him in practice, together with several attornies who had professionally employed him, were called as witnesses; and from their evidence it appeared, that, with the exception of occasional attacks of bile, and temporary depression of spirits, which they attributed to domestic circumstances, Mr. Abraham, though florid and robust, and sometimes exhibiting symptoms of determination of blood to the head, was, as far as they knew, in an excellent state of general health up to the fall of the year 1827; and they stated, that, in their opinion, he was in good health, both of body and mind, at the time when the insurance was made, viz. the end of April in that year. About the beginning of September in the same year he became ill, and was disordered in mind, but he went into Court in the ensuing term. It appeared, however, from the evidence of one of his sisters, that in 1823, in consequence of depression of spirits, he was attended by a medical man named Williams, who was in partnership with Dr. Burrows, and by his advice Dr. B. was called in. Dr. B. recommended that he should be removed from

business to an establishment of his in the neighbourhood of London; but, on the sister's objecting to this, and Dr. Sutherland, who also saw him, not considering it necessary, he only took lodgings at Hampstead, and came to town every day, and attended to his business. This, after some short time, restored him to health. Mr. Vance, the surgeon, was also called as a witness, and gave his opinion of the good state of Mr. Abraham's health. He admitted, on his cross-examination, that if he had known that Mr. A., in the year 1823, had been attended by Dr. Sutherland, Dr. Burrows, and others in that line of practice, he should have thought it his duty to communicate the fact to the office. But he added, that, in his opinion, such a circumstance would not prevent his being an insurable life in April, 1827, as he should consider he was then a recovered man.

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Sir *J. Scarlett*, for the defendants.—There was a withholding of facts material to the risk. It appears from the certificate of the surgeon at Ashburton, that he had attended Mr. Abraham for a year, and that his death was occasioned by apoplexy. Information should have been given to the office of the illness in 1823. There is no doubt that he was thought a good life, and that there was no fraud. But the non-communication of a fact important to the risk avoids the policy. The person who effects an insurance on another's life renders that other his agent, and is bound by his representations. *Von Lindenau v. Desborough* (a). The last case is that of *Williams v. Duckett*, tried in the Exchequer by Lord Lyndhurst, in December, 1831. It was an action by one office against another. The policy was on the life of Mr. Stephenson, who appeared before the directors. Lord Lyndhurst told the jury, that, if they were of opinion that the fact not mentioned was material to the risk, the defendants were

(a) Ante, Vol. 3, p. 353.

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entitled to the verdict, though the plaintiffs, the other insurance office, were quite ignorant of it. A motion was made in the case for a new trial, but a rule was refused.

DENMAN, C. J.—I believe no objection was made on the motion to Lord Lyndhurst's summing up.

Sir *J. Scarlett*.—The jury inquired of Lord Lyndhurst if they were to be satisfied of *concealment*. His Lordship, upon this, introduced a very correct distinction. He said to the jury—"You use the word *concealment*. I do not choose to use that word, as it may import fraud. The mere non-communication of the facts, if you are of opinion that they were material, will avoid the policy." In the present case, Mr. Abraham, to whom I do not impute any fraud, says emphatically—"occasional indigestion *only*." This the healthiest man may have, and it is, in fact, no disease at all. But he was subject to determination of blood to the head; and this is a very different thing, and ought to have been communicated. Determination of blood to the head and apoplexy are connected; and as he had one fit so soon after the policy as August, 1827, and eventually died of apoplexy, the determination of blood to the head was very material. The delusions, also, under which he laboured, as to the supposed falling off of his business, and as to the conduct of the bench and the bar towards him, were very material. If these communications had been made, would not the company have made further inquiries, to see if it would not require a higher rate of premium? and if they would, then the policy is void.

On the part of the defendants, a person who had been clerk to Mr. Abraham was called, and deposed to facts which tended strongly to shew decided insanity for several years; but, on cross-examination, his credit was very materially shaken. Dr. Burrows was then examined, and produced a memorandum which he made respecting Mr.

Abraham, when he attended him in the year 1823. It contained the words "florid complexion, prominent eye, confusion of ideas," &c. He said, that, in his opinion, what occurred then was material to be communicated to the Globe Office, because, though it was but an incipient case of insanity, yet it was attended with strong symptoms of determination of blood to the head, which would lead to the conclusion, that, if the party did not actually go mad, his days would most likely be shortened by apoplexy. Several other medical witnesses gave their opinion that the communication was material, taking the facts to be as Dr. Burrows had stated.

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Campbell, S. G., in reply.—Mr. Abraham himself went before the directors, and submitted himself to any inspection they thought proper. Mr. Vance also wrote the letter which has been read, and Mr. Boyce Combe, one of the directors, another to the same purport. This case differs from *Williams v. Duckett*, as, in that case, the person whose life was insured was, at the time of effecting the policy, in a deplorable state of health; but, in this case, Mr. Abraham was in a perfect state of health at the time.

DENMAN, C. J.—It will be as well to clear our way as we go, upon this point. I believe the defence in *Williams v. Duckett* took two grounds: one was the diseased state of Mr. Stephenson, which I think the jury believed; and the other was the non-communication of material facts.

Campbell, S. G.—I am not aware of any case which decides that the mere non-communication of a fact by a party whose life is insured (being a stranger to the party effecting the insurance) will vitiate the policy. The directors might have put any questions to Mr. Abraham when they had him before them; they had the means of information, and the plaintiff had not; and, if they neglected to avail themselves of those means, the loss must

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fall upon them. But if Mr. Abraham was, strictly speaking, the agent of the plaintiff, what was there that he knew that he has not communicated? He could not be aware that he had incipient insanity in 1823, though Dr. Burrows, from his superior means of knowledge, might have been aware of it; and it does not appear that Dr. Burrows ever communicated it to him, nor Dr. Sutherland, nor any other person. Therefore, supposing that he had incipient insanity in 1823, which I deny, he could not communicate it, because he did not know it. As to the form of the questions, some offices put them in the past tense, and inquire whether the party *ever had* the disorders, &c. But the form of this office is, "*if afflicted* with gout," &c. The only concealment or non-communication relied on is not that of Vance or Grindall, but of Abraham himself. To the referees there is a request that they will favour the directors with all the information in their power respecting the state of the party. But the question to the party is only, "if afflicted with gout, asthma, fits, or any other disorder which tends to the shortening of life." That must mean at the time; and if so, where is the concealment? The clerk is not to be believed. If his statements are true, Mr. Abraham was, in the years 1822, 1823, and 1824, in a state of perfect insanity. But there were sufficient causes, without insanity, to account for his anxiety. All the doctors who have been called had not seen him, but they gave their evidence upon Dr. Burrows' memorandum. He says there were "florid complexion, prominent eye, confusion of ideas," &c. Dr. Sutherland also was in Court, and was not called. The individual whose life is to be insured, not being a medical man, has to answer a different set of questions from those put to the referees. The doctors only say that *they would* have communicated these things. There is no evidence of what the communication was which Mr. Abraham made when he personally appeared before the directors. Why did they not call their actuary,

or some person present? How can we tell that the necessary questions were not asked by the medical man who is always present on such occasions?

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DENMAN, C. J. (in summing up).—The last argument cannot, in my opinion, be insisted on, viz. the supposed inquiry on the personal appearance of Mr. Abraham; for it seems to me, that the whole question turns upon the words—that if there is any misrepresentation of the age or state of health of the party, it shall vitiate the policy. The question, therefore, will be, whether Mr. Abraham made a misrepresentation when he answered to the question whether he was afflicted with gout, &c.—“Neither: occasional indigestion only.” We are not trying a question of insanity, but insanity is brought, by a round about course, to bear upon the question of physical malformation. It seems there was sufficient cause for depression of feeling, without insanity, in the state of Mr. Abraham’s domestic affairs. You have, in Dr. Burrows’ evidence, the direct testimony of an eye-witness, and an opinion founded upon that, as to the materiality of the communication. The other medical men found their opinions upon what Dr. Burrows has stated; and if he is quite correct in his account, it would be very difficult to say that the facts were not material to be communicated. But Mr. Vance differs in opinion as to their materiality. You will, therefore, have to say whether the communication was or was not material. I confess that I entertained, at first, considerable doubts whether a third person, not having any interest in the immediate cause, could, by any misrepresentation, injure the party making the insurance. I will not give any opinion on that point here: it may very fitly be considered elsewhere. But it does not appear that Mr. Abraham was aware of the facts; and this will raise a very important question of law, if you should think that there was a concealment of facts material to be communicated. And therefore, the two questions which I

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shall leave to you will be—*First*, Whether you think Mr. Abraham represented truly the state of his health, according to the question put to him? and, *Secondly*, If he did not, did he know the state of health in which he had been, so as to furnish a proper answer to that question?

The jury said they thought that Mr. Abraham was not aware of what had taken place, and could not, therefore, communicate it; and they found a verdict for the plaintiff—*Damages 446*l.* 10*s.**

Campbell, S. G., F. Pollock, R. V. Richards, and Whateley, for the plaintiff.

Sir *J. Scarlett, Maule, and Follett*, for the defendants.

[Attornies—*Teesdale, S. & W., and Freshfield & Son*].

Second Sittings at Westminster, in Trinity Term, 1833.

BEFORE MR. JUSTICE TAUNTON.

May 29.

TORRIANO and Others v. YOUNG.

If a person has held under the terms of a lease, and holds over after the lease is at an end, he is bound by the terms of it, although no new bargain to that effect is entered into between

the parties; but if he comes in as an under-tenant, before any lease was granted to the person of whom he took the premises, and that person afterwards take a lease, if there is no evidence that he knew of the lease, it will be for the jury to say whether he is not an under-tenant, and not an assignee of the lease.

If an assignee of a lease commit waste, the landlord may sue him in covenant, or in a special action on the case, but not in assumpsit.

A tenant from year to year is not liable for permissive waste, and is not liable to make good mere wear and tear of the premises.

ASSUMPSIT.—The declaration stated, that, in consideration that the plaintiffs would let a field, situate in the parish of St. John, at Hackney, to the defendant, the defendant undertook and promised to occupy it on the terms contained in a lease granted to Mr. Le Mesurier by Colonel Norris. It then went on to aver, that that lease

contained a covenant to repair, and to leave the premises in repair. Breaches—That the defendant did not repair, and did not leave the premises in repair. Plea—General issue.

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It appeared from the evidence of Mr. Bird, who had been receiver for Colonel Norris since the year 1805, that Mr. Le Mesurier rented the field of Colonel Norris in the year 1810; and that, at Christmas, 1810, the defendant took the field of Mr. Le Mesurier, and remained in possession till the year 1832. During the whole of the time of the defendant's occupation he paid the rent to the witness, as the agent of Colonel Norris, the amount of rent payable from the defendant to Mr. Le Mesurier being exactly the same as that payable by Mr. Le Mesurier to Colonel Norris. On the part of the plaintiffs, a lease of the field, from Colonel Norris to Mr. Le Mesurier, dated in the year 1811, for eighteen years, was put in. This lease contained covenants to repair and leave in repair, but it described the field as in the occupation of Mr. Le Mesurier. There was no evidence given to shew that the defendant had any knowledge of this lease. It was proved that the field had a fence, partly of paling and partly of quick, and that some of the pales had been stolen, and that in some places the quick was defective. The witnesses stated the amount of the damage to be 15*l.* 8*s.* 2*d.*

Barstow, for the defendant.—The defendant was in the occupation of this field as tenant of Mr. Le Mesurier, the latter being the tenant of Colonel Norris; and while it was occupied in this way, Colonel Norris granted a lease to Mr. Le Mesurier. However, the important fact is this, that the defendant never heard of any lease, and was, of course, ignorant of the whole of the covenants. There is nothing from which it can be inferred that he was assignee of this lease, and the payment of the

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rent was made by him to Mr. Bird, to avoid a circuitry of payment, the amount due from each party being the same. This is not like the case of *Digby v. Atkinson* (a), as in that case the defendant had been the assignee of the lease. This is not even the case of an under-tenant coming in after a lease, as the under-tenant was in possession, and the lease was granted to his landlord in the following year.

Mr. Fox was called as a witness for the defendant, to prove that he had been employed by the defendant, in the year 1828, or 1829, to put the premises into tenantable repair, and that he did so.

Dampier, for the plaintiff.—The defendant paid rent to the agent of the superior landlord.

TAUNTON, J.—Looking at this declaration, I find that you do not charge the defendant as assignee of the lease: you charge him as tenant from year to year; and that being so, you cannot make him liable for any repairs during the lease. Still, if he held under the terms of the lease, he would be liable for what occurred between the end of the lease and the year 1832.

Dampier.—I charge the defendant with holding over on the terms of the lease, one of which is to leave the premises in repair.

(a) 4 Camp. 275. In that case it was held, that if, after the expiration of a written lease containing a covenant by the tenant to keep the premises in repair, he verbally agrees to hold over, paying an additional rent, nothing more being expressed between the parties respecting the terms

of the new tenancy, he is presumed to hold under the covenants of the former lease, as far as they are applicable to his new situation; and, if the premises are afterwards burnt down by accidental fire, he is bound to rebuild them.

TAUNTON, J.—He is only liable for what occurred after the end of the term.

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Dampier.—I submit, that if a tenant take premises, and agree to leave them in repair, he will be bound to do so, though they were out of repair when he came to them.

TAUNTON, J.—In the case of *Kinlyside v. Thornton* (a), Lord Chief Justice de Grey says—"Tenant for years commits waste, and delivers up the place wasted to the landlord. Had there been no deed of covenant, the action of waste, or case in nature of waste, would have lain. Because the landlord, by the special covenant, acquires a new remedy, does he therefore lose his old?" And in the same case Mr. Justice Blackstone says—"Action of waste lies against tenants for years, after the term is expired, only the writ must be in the *tenuit*, and not in the *tenet*." The plaintiff's remedy would be in assumpsit for the latter part of the claim, and in covenant for the non-repair during the lease. Indeed, there might be a special action on the case, for the non-repair during the lease, but not an action of assumpsit.

Dampier, for the plaintiff, replied.

TAUNTON, J., (in summing up).—This is an action for the non-repair of the fences of a field, from the year 1829 to the year 1832; and, in my opinion, the only question for your consideration is, under what terms the defendant held the premises. If he held the premises under the terms contained in the lease, while the lease was in existence, he, as his possession continued afterwards, would be liable to the same terms and conditions as were contained in the lease. If a person has held under the terms of a lease and holds over after the lease is at an end, he is bound by the

(a) 2 Sir W. BL 1111.

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terms of it, although no new bargain to that effect is entered into between the parties. But, if you are of opinion that Mr. Young never held as assignee of this lease—if you believe that he came in as under-tenant of Mr. Le Mesurier, and never entered into any contract, express or implied, with the superior landlord—he must not be considered as assignee of the lease, but merely as a tenant from year to year. I agree with the learned counsel for the plaintiff, that, if a party comes in when there is a lease, it is *prima facie* evidence that he comes in under it. Therefore, if Mr. Young had come in *after* this lease had been granted to Mr. Le Mesurier, and had paid rent to the superior landlord, he might well have been considered as assignee of the lease; but the doubt, if any there be, and that I shall leave to you, is, whether as Mr. Young was in possession before the lease was granted, his holding could have any thing to do with the lease. Mr. Young has paid the rent reserved by the lease to the agent of the superior landlord. That, taken by itself, would be a strong fact to shew, that he held under the lease; but still it might be to avoid a circuitry of payment. You will, therefore, say, whether the defendant held as assignee of the lease, or as tenant from year to year. In the former case the plaintiff would be entitled to recover; but if Mr. Young was merely a tenant from year to year, he would not be liable, as this is merely permissive waste; and a tenant from year to year is not liable to make good such damage as has been proved in this case, and he is not liable for the mere wear and tear of the premises (*a*); indeed it can hardly be expected, that, even under a covenant to repair, a tenant would put up a new fence, as even in that case he would only be liable to keep the fences in sufficient repair. The witnesses state the amount of the dilapidations to be 15*l.* 8*s.* 2*d.*; which probably must all have occurred since the year 1829, as Mr. Fox states that he, about that time, put the pre-

(a) See the case of *Auworth v. Johnson*, ante, Vol. 5, p. 339.

mises in repair. If Mr. Young during the lease held the premises as assignee of the lease, the plaintiffs will be entitled to recover this sum of 15*l.* 8*s.* 2*d.*; but if he was only tenant from year to year, as this is only permissive waste, he will not be liable at all.

Verdict for the defendant.

Dampier and *Rawlinson*, for the plaintiffs.

Barstow, for the defendant.

[Attornies—*Dampier*, and *Wilks & Minithorpe*.]

Dampier afterwards applied to the Court for a new trial, but the Court refused a rule.

Adjourned Sittings at Westminster, after Trinity Term,
1833.

BEFORE LORD CHIEF JUSTICE DENMAN.

HOWARD, Gent., one &c. *v.* BARTOLOZZI.

MONEY lent. Pleas—1*st*, general issue; 2*nd*, the insolvent debtors' act.

The plaintiff's case was admitted; but the plea of the insolvent debtors' act became immaterial, because, although the defendant had taken the benefit of the insolvent debtors' act after the time of the plaintiff's debt accruing, the plaintiff's debt was not included in the defendant's schedule, which was filed in the insolvent debtors' court.

Kelly, for the defendant, opened, that the plaintiff had been the attorney of the defendant; and that, besides acting as her attorney, he had lent her the amount in ques-

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June 15*th*.

If a party who takes the benefit of the insolvent debtors' act, is induced by his attorney to omit out of his schedule a debt due from him to the attorney, and by such procurement the debt is omitted out of the schedule, the attorney cannot afterwards recover that debt from the party in an action.

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tion: and that the defendant, being obliged to take the benefit of the insolvent debtors' act, employed the plaintiff to prepare her schedule, and that he fraudulently omitted to include his own debt in the schedule.

The schedule was produced, and the debt now claimed by the plaintiff was not specified. It appeared that the schedule of the defendant, Miss Bartolozzi, had been prepared in the plaintiff's office, but that the plaintiff was not her attorney in the insolvent debtors' court, he not being an attorney of that court. And it was stated by one of the witnesses for the defence, that he heard the defendant ask the plaintiff to be sure to include all her debts in her schedule, and not to omit any.

Campbell, S. G., in reply, left it to the jury on the credit of the last-mentioned witness; and submitted that it was quite manifest that the reason why this claim of the plaintiff was not included in the schedule was, that Miss Bartolozzi had desired him to omit it, because she intended to pay him in full, as it was for cash actually lent to accommodate her, and upon which in no event could the plaintiff gain any profit or advantage.

DENMAN, C. J., (in summing up).—The question is, whether the plaintiff induced the defendant to leave his debt out of her schedule; for, if he did so, he cannot afterwards sue her for it in a court of law. That is the law of the case; and I wish the gentlemen on both sides to attend to it as I lay it down. The fact that the plaintiff did so induce the defendant to omit the debt out of the schedule, is a fact to be made out to your satisfaction by the defendant; and it is for you to decide upon the evidence before you, whether it was by the procurement of the plaintiff that this debt was left out of the defendant's schedule. If you think that it was, the defendant is entitled

to your verdict; and this is a question entirely for your consideration.

Verdict for the defendant.

Campbell, S. G., and Follett, for the plaintiff.

Kelly and W. H. Watson, for the defendant.

[Attornies—*Howard, and J. & H. Lowe & Co.*]

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TURNER v. ROBINSONS and SANFORD.

June 29th.

ASSUMPSIT for wages. Plea—general issue. The plaintiff claimed 37*l.* as wages, due to him from the month of January, 1831, to the month of June in the same year.

It appeared from the evidence of a young man named Evans, that the plaintiff entered the service of Messrs. Robinson, who were silk-manufacturers, on the 1st of January, 1830; and that, in the year 1831, Mr. Sanford, the other defendant, joined the firm, and the plaintiff thereupon became the servant of the three defendants; and from the month of January, 1831, the plaintiff was employed in a different way from that in which he had been employed before. It further appeared, that the plaintiff was dismissed by the defendants in the month of June, 1831. The plaintiff claimed his wages against the three defendants from the month of January, 1831, to the month of June in the same year. It further appeared, from the cross-examination of Mr. Evans, that he was in the manufactory of the defendants, in the nature of an apprentice, to learn the business, and that he was to serve for four years; two years and a half of which had expired, when, in consequence of the advice of the plaintiff, he, on the 8th of June, 1831, left the service of the defendants to go to America: and this witness further said, in his cross-examination, “the plaintiff procured the necessary things for me to go away. He helped me to go; and he told me to

If a yearly servant be dismissed by his master before the year expires, for such misconduct as will justify his dismissal, the servant is not entitled to any wages for the time during which he served.

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help myself to my wages out of the till when I ran away."

In the course of the cause it was mentioned by the counsel on both sides, and by the Lord Chief Justice, that the defendants had brought an action against the plaintiff for seducing Mr. Evans from their service, and had obtained a verdict for 40*s.* damages.

The witness Evans, in answer to a question put by *F. Pollock*, for the defendants, stated, that the plaintiff had told him that he, the plaintiff, was to have 80*l.* a year.

F. Pollock, for the defendants, submitted that the plaintiff must be nonsuited. The plaintiff being a yearly servant, and being rightfully dismissed from the service before the year had expired, he was not entitled to any wages at all. He cited the cases of *Spain v. Arnot* (a), and *Pagani v. Gandolf* (b).

DENMAN, C. J.—I do not understand that the dismissal of the plaintiff is objected to as being improper, as he only claims wages for the time during which he actually served.

F. Pollock.—I submit, that, as the plaintiff was worse than a useless servant, he is not entitled to any wages at all. This appears from the cases of *Huttman v. Boulnois* (c), *Beeston v. Collier* (d), *Atkin v. Acton* (e), *Callo v. Brouncker* (f), and *Brown v. Croft* (g). I take it to be clear,

(a) 2 Stark. 256.

(b) *Ante*, Vol. 2, 370.

(c) *Id.* 510.

(d) *Id.* 607.

(e) *Ante*, Vol. 4, 208.

(f) *Id.* 518.

(g) A MS. case, cited by Mr. Chitty in his work on the General Practice of the Law, p. 81. This case was tried before Lord Tenterden, C. J., at Guildhall, in

March, 1828. The plaintiff was a shopman and sued for four quarters' wages. It was proved that the defendant was a silversmith, and that the plaintiff, while in his service as a shopman, had embezzled silver spoons, and also money he had received for his master; Lord Tenterden, C. J., ruled, that if a servant habitually embezzled his master's property,

that a hiring at a yearly salary is *prima facie* evidence of a yearly hiring, and that a dismissal for a due reason within the year disentitles the servant to wages. Suppose a servant destroyed one of his master's horses, the master may sue him for damages, which he would be unable to pay. But still, as I submit, if he was dismissed for his misconduct, he could not bring an action against his master for his wages.

DENMAN, C. J.—Upon the authorities cited, I feel bound to nonsuit the plaintiff; but, as there is no disputed fact, I shall give the plaintiff's counsel leave to move to enter a verdict for the plaintiff for 37*l*. However, my opinion is, that the contract is entire.

Nonsuit, with leave to move to enter a verdict for the plaintiff for 37*l*.

Law, Coltman, and Ball, for the plaintiff.

F. Pollock and Carrington, for the defendants.

[Attornies—*Harmer & Co.*, and *R. Cole*.]

In the ensuing term, *Law* moved, in pursuance of the leave given, to enter a verdict for the plaintiff, but the Court refused a rule.

the amount embezzled is wholly immaterial; and, although the arrear of wages sought to be recovered may exceed the amount embezzled, the servant is not entitled to any thing.

In the case of *Cutter v. Powell*, 6 T. R. 320, it was held, that if a mate, hired for a voyage, take a promissory note from his employer for a certain sum, provided he proceed, continue, and do his duty on board for the voyage, and before the arrival of the ship he dies, no wages can be claimed either on the contract, or on a *quantum meruit*. But Mr. Justice Lawrence

said: "With regard to the common case of a hired servant, such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year. So, if the plaintiff in this case could have proved any usage that persons in the situation of this mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage."

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BEFORE MR. JUSTICE LITLEDALE,

(Who sat for the Lord Chief Justice.)

July 10th.

MORRISON and GRAY v. BUCHANAN.

It is the regular and usual course of business in commercial transactions to deliver out a bill of exchange, left for acceptance, to any person who mentions the amount, and describes any private mark or number upon it; and if the clerk of the party leaving it by his conduct enables a stranger to discover the mark or number, in consequence of which the bill is delivered out to him, the party leaving it cannot maintain trover for the bill against the party who so delivered it out.

TROVER for a bill of exchange, made in Van Diemen's Land.

On the part of the plaintiffs, a clerk of Messrs. Morrison & Co., who were the London correspondents of the plaintiffs, who carried on business in Dublin, was called as a witness. He stated, that, on the 26th of April, 1832, a bill, drawn by the plaintiffs on the defendant, was left with him; that he put his own initials, R. S., in the left-hand corner, and gave it to the out-door clerk, with directions to leave it for acceptance. On his cross-examination he said, that, on the following day, the 27th, at five in the afternoon, he asked the out-door clerk for the bill, but he had not got it. That he knew that an offer was made by the defendant to pay the amount, if the London correspondents of the plaintiffs would indemnify him against the consequences; but they refused upon principle to indemnify him against what they considered to be the effects of his own negligence, particularly as they were not parties to the bill. He added, that the bill was indorsed in blank by the plaintiff, Gray, because he did not know to whom it was to be appropriated.

The out-door clerk was then called, and stated that he received the bill about two or three o'clock on the 26th of April, and left it at the defendant's counting-house about half-past four that day; that he did not call for it again till the afternoon of the 28th, which was a Saturday, when he was told by a clerk in the defendant's counting-house that he could not find such a bill; but, as the defendant might have it among his papers, he had better look in again. That in consequence he called on Monday the 30th, when

the same clerk told him that the bill had been given out on the Saturday morning, by a person who was not then within. On his cross-examination he admitted that he was in the habit of going to a public-house to spend the evening. A letter, written by the defendant on the 3rd of May, was put in and read; it stated that the bill was duly accepted and delivered out by one of his clerks, on Friday, the 26th (a) of April, to a person who gave the particulars. A demand of the bill was proved to have been left at the defendant's counting-house on the 17th of October, and the person who left it, on calling the next day, was told, by the defendant himself, that he had given the bill out to a person who described it. A book of the plaintiffs' London correspondents was called for, and on its production an entry was referred to, signed by the out-door clerk, by which it appeared, that, under the date of the 25th of April, three bills, of which the bill in question was the last entered, were delivered out on that day, and not on the 26th. A letter was also read, in which the 25th was mentioned as the day.

On the part of the defendant, two of his clerks were called as witnesses; and from their evidence it appeared that bills for acceptance were put into a box without the persons leaving them being seen. That the person calling for a bill generally mentioned the amount, and was then asked if he had any mark or number; and if he gave the right mark or number, the bill was given out. That the bill in question was found in the bill box on the 26th of April, and was accepted by the defendant on the morning of the 27th. It was then put in a chest in the usual place. That between twelve and two of the same day, a person came and asked for the bill, mentioning the amount and giving the right mark, upon which it was given to him. That afterwards, about four o'clock, the out-door clerk of the plaintiffs' correspondents came

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(a) This was a mistake, the 26th was Thursday.

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and asked for the bill, and was told that it had been given out. He said, he thought it was impossible, as nobody knew of it but himself and their head clerk, but he would inquire about it. On his being asked why he did not come earlier, he said that he had forgotten it.

Mr. Stone, one of the partners in the house of Marten, Stone & Co., bankers, proved that it was the usual and regular course of business to give out a bill to a person who mentioned the amount, and the mark or number.

[Several of the jury, which was special, said, that they knew that to be the universal rule.]

On the cross-examination of Mr. Stone, he said: "It is for the convenience of the acceptor to leave the bill, that he may refer to the advices. We have no box for bills in our house." On his re-examination, he said: "If one person brought the bill, and another called the next day and described the mark or number, he would certainly have the bill. It is for *mutual* accommodation that a bill is left, as the party bringing it might be kept the whole day while reference was made to advices and entries."

Sir J. Scarlett, for the defendant.—If the out-door clerk had the bill on the 25th, and did not leave it for acceptance till the 26th, that is negligence on the part of the plaintiffs. Clerks cannot remember the faces of all persons who bring bills. It is a curious fact, if the bill is not in the hand of some friend of the out-door clerk, that it has never been presented. The defendant could not do otherwise than give the bill to any person who mentioned the private mark. If there was negligence in the clerk who left the bill, then the defendant is entitled to the verdict; and, if there was not negligence on either side, then, in point of law, the defendant offered to do all that was proper, viz. to pay on an indemnity. As to inland bills, the stat. 9 & 10 Will. 3, c. 17 (a), provides, that if such a bill

(a) Sect. 3 enacts, "that if any inland bill be lost or miscarry within the time limited for its payment, the drawer shall, on security given

is lost, the party is entitled to a renewal on giving an indemnity. And this is reasonable as to foreign bills also. The out-door clerk by keeping the bill, instead of presenting it at once, enabled some person to discover the private mark, and thereby also enabled that person to obtain possession of the bill.

Hoggins, for the plaintiffs.—Leaving the bill is an accommodation to the drawee. A person has a right to say, “Here is a bill, will you accept it or not?” With respect to the date of the 25th, as there are three bills in the entry, a date may have been omitted between the other two and this. The clerks swear that it was the 26th, and the defendant has proved that it was called for on the 27th; and if so, it is clear there was no negligence on the part of the plaintiffs. Unless there has been such negligence on the part of the plaintiffs as to cause the loss of the bill, they are entitled to recover. As to the indemnity, there was no offer to pay on an indemnity by the plaintiffs, but only on an indemnity by the London house, who were only agents. If there was no negligence on either side, then the plaintiffs have a right to recover, as the bill was their property, and has not been delivered to them.

LITLEDALE, J. (in summing up).—The questions for you will be, *first*, whether there was any negligence on the part of the plaintiffs in their conduct with respect to the bill; and, *secondly*, whether there was negligence on the part of the defendant. If you are of opinion that there was negligence on the part of the plaintiffs, then they will not be entitled to recover; but, if the negligence was on the part of the defendant, then the plaintiffs will be entitled to

upon request to indemnify him if such bill shall be found again, give another bill of the same tenor as the first.” Upon this section Mr. Baron Bayley observes, (Bills of Exchange, p. 107), “It should seem that the equity of this statute

would comprehend indorsements also; and that the 3 & 4 Anne, c. 9, which gives the like remedies upon notes as were then in use on inland bills, would extend it to notes.”

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the verdict. If there was not any negligence on the part of either plaintiffs or defendant, then the matter may be reserved for further consideration, as it is admitted to be a doubtful point of law. As to the first point, you will consider whether the plaintiffs' witnesses were the cause of the finding out of the private mark. It is suggested that if the bill was given to the out-door clerk on the 25th, and he did not present it till the 26th, he might have shewn it at the public-house. If he by his improper act enabled a person to ascertain the private mark, and thereby to procure the bill to be delivered out according to the usual course of business, then it will be for you to say whether you do or do not consider that as negligence. The question as to the defendant is, has he been guilty of that kind of negligence which amounts to a conversion of the bill? It was supposed at first that the plaintiffs' clerk waited a day too long, not calling for the bill till the next day but one. That, however, turned out otherwise. But if it had been so, it would not have made any difference, as it seems that the mischief was done by the delivery out of the bill on the morning of the next day. You will consider, *first*, whether there was negligence on the part of the plaintiffs; and if you think there was, you will find for the defendant. You will consider, *secondly*, whether there was negligence on the part of the defendant; and if you think there was, you will find for the plaintiffs. If you think that there was not any negligence on the part of either, then you will find your verdict for the plaintiffs, subject to a case for the opinion of the Court.

The Jury said they found negligence in the plaintiffs on the part of the out-door clerk, and that the defendant had used all due caution, and therefore gave a

Verdict for the defendant.

Hoggins, for the plaintiffs.

Sir *J. Scarlett* and *R. V. Richards*, for the defendant.

[Attornies—*W. H. Ashurst*, and *N. & M. Clayton*].

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COURT OF COMMON PLEAS.

First Sitting in London, in Easter Term, 1833.

BEFORE MR. JUSTICE BOSANQUET.

WILLIAMS v. HOLLAND.

CASE for driving a chaise against the plaintiff's cart, and overturning it, and injuring the plaintiff's son and servant who was driving it. One of the witnesses attributed the injury to the carelessness of the defendant.

Bompas, Serjt., for the defendant, submitted that the form of action should have been trespass, and not case. He cited *Leame v. Bray* (a), *Day v. Edwards* (b), and *Sheldrick v. Abery* (c).

Ludlow, Serjt., for the plaintiff, referred to *Branscomb v. Bridges* (d), *Hall v. Pickard* (e), and *Moreton v. Hardern* (f).

(a) 3 East, 593, and 5 Esp. 18. According to that case the distinction is, that where the injury is immediate from an act of force done by the defendant, the remedy is in trespass; where the injury is only consequential to an act before done, then it is in case.

(b) 5 T. R. 648. The decision in that case was, that a plaintiff cannot declare in case for so furiously driving a cart, that, by the improper conduct of the defendant, it was driven with great force against the plaintiff's carriage, per quod the loss happened, the proper remedy being trespass vi et armis.

(c) 1 Esp. 55. That case decided, that trespass vi et armis was the proper remedy for killing the

plaintiff's horse, though the injury arose from negligence.

(d) 1 Barn. & Cres. 145, and 2 Dowl. & R. 256. According to the decision there, case is the proper remedy for an excessive distress for rent, though the rent was tendered to the landlord before the distress was levied, (which would make the person putting it in a trespasser), as the plaintiff might waive the trespass if he thought proper.

(e) 3 Camp. 188. A stable-keeper who lets horses on hire, which are injured while on hire by the defendant's having driven a cart against them, should bring case for the injury, and not trespass.

(f) 4 Barn. & Cres. 226, and 6 Dowl. & Ryl. 275. Case against

April 26th.

Where, through negligent and careless driving, one vehicle is caused forcibly to strike against another, an action on the case is maintainable for the injury done, although it be immediate upon the violence, unless the act producing it be a wilful act.

If an injury be occasioned partly by the negligence of the plaintiff, and partly by that of the defendant, the plaintiff cannot maintain any action.

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Archbold, on the same side.—There was the case of a ship in which the authorities were brought under consideration, and it was held, that, if there was negligence or unskilfulness, the party might waive the trespass, though the injury was immediate upon the violence.

BOSANQUET, J., said, that he would take a note of the objection, and give leave for a motion to enter a nonsuit.

The case proceeded, and

BOSANQUET, J., in summing up, told the jury, that if the injury was occasioned partly by the negligence of the defendant, and partly by the negligence of the plaintiff's son, the verdict could not be for the plaintiff (*a*).

Verdict for the plaintiff—damages 12*l.*,
 subject, &c.

Ludlow, Serjt., and *Archbold*, for the plaintiff.

Bompas, Serjt., for the defendant.

[Attornies—*Branscomb*, and *Whitehouse*].

In the ensuing term a motion was made pursuant to the

three coach proprietors. The declaration stated, that, through their negligence, their coach ran against the plaintiff and injured him. The jury found that the injury was occasioned by the *negligent driving* of one of the defendants:—*Held*, that the action on the case was maintainable against all three; and, *semble*, that trespass might have been maintained against the one who was driving.

(*a*) See the case of *Pluckwell v. Wilson*, Bart., ante, Vol. 5, p. 375, in which Mr. Justice Alderson said, that, if the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to the verdict. See also the cases there referred to. See also the cases of *Boss v. Litton*, ante, Vol. 5, p. 407, and *Goodman v. Taylor*, Ib. 410.

leave given, and a rule nisi obtained, which, after argument and time taken to consider, was—

Discharged (a).

(a) See 10 Bing. 112, for an account of the argument, &c. The opinion expressed by the Court seems to amount to this—that, if an injury be occasioned by the

carelessness and negligence of the defendant, the plaintiff may maintain case, although the injury be immediate, so long as it was not produced by a wilful act.

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Second Sitting in London, in Easter Term, 1833.

BEFORE MR. JUSTICE BOSANQUET.

TRIMBEY v. VIGNIER.

May 3rd.

ASSUMPSIT on two promissory notes, one for 300 francs, which became due on the 15th of December, 1829, and the other for 600 francs, which became due on the 31st of December, 1829. They were made by the defendant, and indorsed by him to one Bourignon, by Bourignon to Durand, and by Durand to the plaintiff.

By the law of France, an indorsement in blank of a promissory note is not valid.

But *semble*, that there is nothing in that law which makes it absolutely necessary for a promissory note to be protested for non-payment, in order to enable the holder to recover against the maker.

Semble, also, that, by the same law, a promissory note may be indorsed after it becomes due.

If a promissory note be concocted in France, the maker being domiciled there

Andrews, Serjt., for the defendant.—As the notes were drawn and concocted in Paris, it was necessary to prove a demand there when they became due, and to protest them if not honoured. This is required by the French law. The French law also requires that the date and consideration of an indorsement should be stated in it. The first ground of defence, therefore, is, that there was not any protest; and the second, that Durand's indorsement, under which the plaintiff claims, does not conform to the French law, inasmuch as it contains neither date nor consideration, but the name only. Bourignon, the in-

both at the time of making and when it becomes due, whether, if he afterwards comes to England, an action is maintainable against him in the English Courts upon it, although it lacks the formalities required by the French law—*quære?*

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dorser to Durand, writes—" I guarantee to Mr. Durand, that the protest and notice required in the case of a foreign bill shall be considered as made, without their being made." But this does not authorize Durand to send the notes forth into the world, without the necessary formalities.

On the part of the defendant, a witness named Colin was called, who stated that he had been a French advocate for twenty years, and had practised at the bar in Paris, and was now attached to the consulate in this country. He said—" I know the mercantile law of France. That part of the Code Napoleon called the Code de Commerce contains that law, and is admitted as authority in the French Courts. There is no difference, as to liability to the holder, between the maker of a promissory note and the acceptor of a bill of exchange. The same law prevails as to both. The holder of the bill and the note have the same formalities to go through. The formality necessary to enable the holder of a promissory note to recover against the maker is the protest, which is signed by a sheriff's officer or a notary, on the proposition of the last holder; and the protest must be in writing. A copy of these registers or acts must be kept, under a severe penalty. The protest must be made within twenty-four hours from the time of the note's becoming due, and it must contain a copy of the instrument. If the maker had become bankrupt, a protest is necessary, to have recourse against the indorser, and ought to be signified to the indorser within a fortnight previous to the protest. Payment of the note must be demanded at the residence of the maker, or at the place of payment, if any is specified. If the party's residence differ from the place specified for payment, it is absolutely necessary to present it where it purports to be made, whether that is the residence of the maker or not. The protest must contain a statement that that has been done. According to Articles 136 and 137 of the Code de Commerce, the property in a bill is trans-

mitted by means of an indorsement, which is dated, and expresses the value given, and gives the name of the person to whom the indorsement is made. The indorsement by Durand, in this case, is in blank, and therefore is not valid. By Article 189 it is required, that an indorsement must be truly made (*a*). It cannot be indorsed after it becomes due; but I do not see any express article to that effect. As to the remedy of the holder against the maker, the effect of there being no protest is, that the maker is always a debtor; but he must have, nevertheless, been warned by a protest. The protest must be made within twenty-four hours, or all recourse against the indorser is lost; and, if the protest is made, and judgment had, the maker is liable for thirty years, except in some particular cases. But, in order to bring an action, he must first prove that the protest has been made. Article 189 says, that the five years for bringing an action are to be reckoned from the date of the protest (*b*). There is not any case in the French Courts which decides that a party can sue without the protest."

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A witness proved that the defendant had a residence in Paris, in Rue St. Denis, the whole of the year 1829, and lived there till the 29th December, when he was taken to prison, where he remained nine months, and then escaped to England, where he had remained, as the witness believed, ever since.

Taddy, Serjt., for the plaintiff, objected to the judgment of the professional witness being relied on as evidence as to the French law.

BOSANQUET, J.—I will tell you my opinion upon that

(*a*) " Il est défendu d'antidater les ordres, à peine de faux."

(*b*) " Toutes actions relatives aux lettres de change, et à ceux des billets à ordres souscrits par des négocians, marchands ou banquiers, ou pour faits de commerce,

se prescrivent par cinq ans, à compter du jour du protêt, ou de la dernière poursuite juridique, s'il n'y a eu condamnation, ou si la dette n'a été reconnue par acte séparé."

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point. I should think, if there were a statute in England, and many decisions of the Courts of law upon it since its passing, a professional witness might be asked, in a foreign country, what the law of England was upon the point, if there were no specific and positive requisition in the statute.

Taddy, Serjt., then in reply contended, that the maker of a note, like the acceptor of a bill of exchange, was always liable, and cited *Shaw v. Harvey (a)*, as shewing that the law of France was not binding in the present case.

BOSANQUET, J., (in summing up), said—The question of foreign law is a question of fact, upon which you must decide. These are notes on which, under ordinary circumstances, the plaintiff would be entitled to maintain an

(a) 1 Mood. & Malk. 526. According to that case, persons trading abroad, in such mode as to constitute a partnership here, may sue here as partners, for consignments sent to this country, although they cannot sue at the place of trading, by reason of the particular law of that country. In the case of *The British Linen Company v. Drummond*, (10 Barn. & Cres. 903), the action was brought on an engagement entered into in *Scotland*, which, according to the law of *Scotland*, might be sued on within forty years. And the Court of King's Bench held, that the case must be governed by the law of the country in which the action was brought, and, it being brought in *England*, six years was a bar. The case of *De la Vega v. Vianna*, (1 B. & Adol. 284), decides, that in a suit between parties resident in *England*, on a contract made between them in a foreign country, the contract is

to be interpreted according to the foreign law; but the remedy must be taken according to the English law. And in *Novelli v. Rossi*, (2 B. & Adol. 757), the Court decided that the French Courts had mistaken the law of *England*, as to the effect of the cancellations of some acceptances; and that, notwithstanding a decree of those courts, an action was maintainable in this country for the debt in respect of which the bills were given. The bills were drawn and indorsed in *France*, but accepted in *England*, and made payable at a banker's there. In *Wynne v. Jackson*, (2 Russ. Ch. Ca. 351), Sir J. Leach held, that a holder may recover in an English Court, on a bill drawn in *France* on a French stamp, though, in consequence of its not being in the form required by the French code, he failed in an action which he brought on it in *France*.

action against the maker, by virtue of the indorsements: It appears that the defendant had a place of residence in Rue St. Denis, at Paris, at the time when the notes became due. The question therefore is, whether, if the defendant was residing in Paris at the time when the notes were drawn and became due, this being to be regulated by the French law, the plaintiff is or is not entitled to recover under indorsements, which would certainly be sufficient, according to the practice in this country, to pass the right to him. Both sides have referred to the printed copy of the Code Napoleon, to which the professional witness referred in his evidence. From the 161st and several subsequent articles of the Code de Commerce, relating to bills of exchange, (and the law appears to be the same with respect to promissory notes), it is said that the holder of a bill of exchange ought to demand payment of it on the day it becomes due, and refusal of payment ought to be verified on the following day, by an act which is called "protest" for default of payment. The bearer is not excused from making this protest, neither by the protest for want of acceptance, nor by the death or failure of the drawee of the bill. The bearer of a bill of exchange, protested for default of payment, may maintain his action, either individually, against the drawer and each of the indorsers, or jointly, against indorser and drawer. By article 176, it appears that a protest should contain a literal copy of the bill, the summons to pay the whole amount, and declare either the presence or absence of the party who ought to pay, the reasons of his refusal to pay, and the inability and refusal to sign. The witness who has been called says, there is no one article which specifically and distinctly applies to the case; and the question is, whether you are satisfied, under these circumstances, that the interpretation which the witness puts upon the articles generally is right, and that the construction put by the courts of law on the Code is such. The witness says, that the indorsement by Durand is not valid, and he refers to Articles 136, 137, and 138. They are to this effect:—

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"The property in a bill of exchange is transmitted by means of an indorsement, which is dated, and expresses the value given, and mentions the name of the person to whose order it is passed. And if the indorsement does not conform to these requisitions, it does not operate as a transfer, but is only a procuration." Now, if this last article is general on the subject, the effect is to make the indorsement not a valid indorsement. The witness says, he does not see any express article against indorsing a bill after it is due, but he has read decisions of the French Courts to the effect that it cannot be done. There is no evidence as to whether the indorsement was made before or after the notes were due. The objection is not that, but that it was not indorsed with the requisite formalities. As to the protest under article 189, the witness says that there must be a protest, as the five years of limitation are to run from it. The effect of his evidence is, that there can be no action against the maker without a protest; and you will have to say whether he has satisfied you upon this point. But there is another point with respect to the indorsement—

[*Taddy*, Serjt.—We will strike out the second indorsement.]

BOSANQUET, J.—It is averred, and cannot be struck out. The general rule is, that an instrument made in a foreign country must be governed by the laws of that country. It seems, therefore, to me, that these notes must be construed as French instruments; and if so, the indorsement is not sufficient. If you are of opinion, either that the indorsement is not conformable to the law of France, or that a protest is wanting, then you will find for the defendant. But to prevent the cause from coming down again, I will give leave for a motion to enter a verdict for the plaintiff, if the Court should think that my opinion is wrong.

The jury at first found for the plaintiff; but, at the request of *Andrews*, Serjt., being asked, said, they thought the Court were to set the matter right. The learned Judge

then further asked them, whether they thought the defendant was resident in France, both when the notes were made and when they became due; and also, whether Durand was a resident in France. The jury answered both these questions in the affirmative. They were then asked, whether, by the law of France, the indorsement was regular; and also, whether a protest was necessary? The jury found that the indorsement was not regular; and that a protest was necessary.

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Verdict for the defendant, with leave, &c.

Taddy, Serjt., and *Kelly*, for the plaintiff.

Andrews, Serjt., and *Shee*, for the defendant.

[Attornies—*Crosby*, and *Kelly*].

IN the course of the Term a rule nisi was obtained, pursuant to the leave given at the trial, which was subsequently turned into a special case, which has not yet been argued. The defendant's counsel, on the production of opinions from France to the effect that the protest was not necessary to enable the holder of a note to maintain an action against the maker, and also, that there was not any law rendering illegal an indorsement after a note had become due, abandoned those points. To save the expense of a second trial, the Court directed that it should be added as a fact to the case, whether or not the notes were actually indorsed in France; and it has been ascertained that the indorser, Durand, had not been in England, so that they must have been indorsed in France. The question, therefore, is narrowed to the point, as to whether the indorsement's being clearly invalid according to the law of France, an action may, nevertheless, be maintained upon the notes against the defendant, he being resident in England at the time when it was commenced.

1833.

Sitting in London after Easter Term, 1833.

BEFORE LORD CHIEF JUSTICE TINDAL.

June 14th.

CORBYN v. LEADER.

In an agreement under seal for the hire of the cabins and accommodations for passengers in a ship, there was a stipulation, that, if it should be necessary for the convenience, and at the request, of the hirer, to put into an intermediate port for stock or otherwise, he (the hirer) would pay all port and necessary charges consequent thereon:—*Held*, that this raised an implied covenant, on the part of the captain who let the cabins, &c., to put into any such port, if required.

There was also a covenant on the part of the letter, to *permit and suffer* the hirer to stow away the baggage of the passengers in a part of the hold:—*Held*, that

this fairly imported that there should be some demand or request made by the hirer for the clearing of the space agreed on.

A covenant to keep up a supply of the necessary and usual quantity of water, for the use of passengers, &c., is not broken by a deficiency for a short time, occasioned by the unusual length of the voyage.

COVENANT.—The declaration in substance stated, that, by certain articles of agreement under seal, signed by the defendant, and dated 29th December, 1831, after reciting that the defendant, as commander of the ship *Oriental*, had full and absolute power to let the cabins and accommodations of that vessel for the convenience of passengers on their voyage from Calcutta to London, and was possessed of cuddy furniture; and that the plaintiff had contracted for such cabins and accommodations for passengers from Calcutta to London, and for the use of cuddy furniture, and for all necessary water for the use and consumption of such passengers, and also for all reasonable space and stowage in the said vessel, for the baggage of passengers, which should be left unoccupied by the government presidency of Bengal: It was witnessed, that, for the sum of 19,000 sicca rupees, and 2,329 sicca rupees, the defendant granted the whole of the cabins and accommodations of the said vessel to the plaintiff, for the conveyance and convenience of passengers from Calcutta to London; and covenanted that he would permit the plaintiff to engage and treat with such persons as he might please, for their passage home on board of such vessel; and would receive such persons as passengers; and would supply them with all necessary water for their consumption and use; and, in the event of any space being left in the

vessel, after the cargo had been sent in by the government of the presidency of Fort William, would suffer the plaintiff to stow away the baggage of his passengers there; and that he would in no way interfere with or interrupt any of the passengers, unless they interfered with the government of the ship; but would generally *promote their comfort and convenience*. The declaration then set out certain covenants on the part of the plaintiff, and, among others, that if, in the progress of the voyage, it should be necessary for the convenience, and at the request, of the plaintiff, to touch or put into any intermediate port or ports, for stock or otherwise, the plaintiff would bear and pay all port and necessary charges consequent thereon. It then averred, that the vessel sailed on the 30th of December, 1831, from Calcutta, and arrived at London on the 23rd of June, 1832, and that there were divers persons on board such vessel during such voyage. Performance was then alleged of the covenants on the part of the plaintiff, and the following breaches were assigned of the covenant on the part of the defendant: viz. *1st*, That he did not supply all necessary water for the consumption and use of the said passengers during the voyage; *2nd*, That, although there was space left in the hold after the cargo was put in by the government, yet the defendant would not suffer the plaintiff to stow away the baggage as he thought necessary; *3rd*, That the defendant interfered with the passengers, &c., and did not promote their comfort and convenience; and, *4th*, That, although it was necessary during the voyage, to touch at and put into the Cape of Good Hope for stock, &c., and the plaintiff was ready to bear the charges, and requested the defendant to touch and put in there, yet he neglected and refused so to do, contrary to his covenant. Pleas—*1st*, *Non est factum*; *2nd*, That the defendant did supply sufficient accommodation for cattle, and did furnish sufficient water, fuel, &c.; *3rd*, That no

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space was left in the hold of the ship by the presidency of Fort William; *4th*, That the defendant was not requested by the plaintiff to allow him to stow away the baggage of his passengers; *5th*, That he did allow the plaintiff to stow it away; *6th* and *7th*, That the defendant did not interfere with the passengers, &c., but did promote their comfort; *8th*, That it was not necessary to put into an intermediate port; *9th*, That the plaintiff was not ready and willing to bear the charges of putting into such port; *10th*, That the plaintiff did not request the defendant to put in; and, *11th*, That he did not refuse to do so.

The agreement was put in. It was dated 29th December, 1831, and recited, in general terms, the object of the parties. The witnessing part, after stating the consideration money, proceeded as follows:—"He, the said James Leader, hath granted and let, and doth by these presents grant and let, to the said Joseph Corbyn, the whole of the cabins and accommodations fitted up for the reception, convenience, and conveyance of passengers in and on board of the said ship or vessel called the *Oriental*, now about to sail from the port of Calcutta aforesaid, on a voyage to the port of London aforesaid by the way of and touching at St. Helena, both above and below, together with the whole of the spaces between decks, from the stern of the said ship or vessel to the extremity of the sail-room," &c. It then contained a covenant by the defendant, that the plaintiff might engage any passengers he pleased, and that he would allow him the unrestrained use of the cabin furniture, and the exclusive services of the cook, steward, and butcher, &c.; and also, that he should have "the sole and undisturbed use of the poultry coops and stock pens in and on board of the said ship or vessel, and space and accommodation for sheep and cattle, necessary and usual on such voyages;" and that he, the defendant, would supply all necessary and usual fuel and water for the consumption and use of the cuddy table, the passengers, and the cattle and stock in and on board of

the said ship or vessel, or to be shipped by the said plaintiff, as also for cookery, and all necessary convenience. It then contained the following covenant:—"That he, the said James Leader, in the event of any space being left in the hold of the said ship or vessel, after the cargo to be sent in and on board of the said ship or vessel by the government of the presidency of Fort William, and in that case only shall and will allow and suffer the said Joseph Corbyn to stow away the baggage of such of his passengers as the said Joseph Corbyn shall think necessary." Then followed general covenants on the part of the defendant, to uphold the authority of the plaintiff in the maintenance of order, and that he would not interfere with the passengers, unless they interfered with the good government of the ship, but *would promote, as far as in him lay, the comfort and convenience of the plaintiff and the persons engaged by him as passengers.* There were then covenants on the part of the plaintiff, that he would uphold the authority of the defendant as commander, and provide a proper table and provisions for the defendant and four officers, and would not interfere with the management of the ship or officers, &c.; and also, that if, in the progress of the voyage, it should be necessary for his (the plaintiff's) convenience, and at his request, to touch or put into any other intermediate port or ports, except St. Helena, he (the plaintiff) would bear and pay all port and other necessary charges which might be incurred thereby or consequent thereon.

On the part of the plaintiff several passengers and two of the sailors were called, and, from their evidence, it appeared that the baggage, which is usually put in the hold, was put on the accommodation deck, to make room for some rice belonging to the captain; and that it was built up, one trunk upon another, leaving only a small space for the passengers to go in and out of their cabins; that there were also several coils of rope, and a large chest of cigars belonging to the captain, placed on the accommodation

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deck, and that all these things obstructed the free current of air; also, that the ship was about ten or twelve miles from the land when the plaintiff went ashore at the Cape, and that he was obliged to bring his stores, consisting of sheep and water, in a great many boats, at a considerable expense. According to their statement, the baggage continued on the accommodation deck till the vessel arrived at St. Helena, where the Company's cargo was discharged, and it was then put into the hold. An obstruction was also occasioned, for two or three days, by placing indigo and rice on the accommodation deck during the unloading of the cargo. It appeared, also, that there were other vessels at anchor at the Cape, at a distance of only about two miles from shore. The following correspondence was proved to have taken place between the plaintiff and defendant. In April, 1832, the plaintiff wrote to the defendant as follows:—

“ Oriental, April 7, 1832.

“ Dear Sir—The protracted period of our passage to the Cape of Good Hope, owing to the continual calms and light winds which we experienced in the Bay of Bengal, (totally unexpected by me, at the season of the year at which we quitted the sand heads), renders it my indispensable duty, on our near approach to the Cape of Good Hope, to address you regarding the very important subject of a deficiency, which, in consequence of the length of the passage, unavoidably prevails on board the Oriental, both as concerns water and provisions, and necessaries of every kind, we having now been seventy days since we quitted Calcutta, and I had, with due reference to former voyages, fully expected that we should reach our present position in forty-five days, and that, with a further only small addition of supplies, to be procured at St. Helena, the difficulty in which I am now placed would not have occurred. It will be unnecessary for me to mention, that there are no less than ——— adult passengers and

thirty-two children, to which we may add a number of servants belonging to the cuddy, and attendants on the passengers; the consumption has, consequently, been very great in every branch of supplies, and, from the extreme heat we experienced in the Bay of Bengal for near a month, a much greater expenditure of water has unavoidably taken place, and, in both instances, far beyond what I could possibly have contemplated on leaving the port. It behoves me, therefore, under these circumstances, to state to you the great necessity which now exists for our putting into the Cape, by which means the evils which now exist will be overcome, and a sufficient supply, both of water and provisions of every kind, procured. It may also be necessary to bring to your notice, that the various supplies of sheep, poultry, &c., cannot be obtained at St. Helena, whilst there is scarcely water enough to last to that island. I hope, therefore, that you will be enabled, after taking all the circumstances into consideration, to attend to my request, and put into the Cape for the purpose referred to; and I beg to assure you, that not a moment shall be lost by me in obtaining the requisite supplies, and enabling the *Oriental* to proceed on her voyage. I certainly should consider myself very blameable, did I not bring these difficulties to your notice, with a view of their being overcome. I have the honour, &c.

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"To Captain Leader."

"J. C."

To this letter the defendant replied as follows:—

*"Ship Oriental, at Sea, Lat. 34° 50',
Long. 240° E., April, 1832.*

"Captain Jos. Corbyn, R. N.

"Dear Sir—In reply to your letter of this date, requesting me to stop at the Cape of Good Hope, that you may supply yourself with stores and stock for your passengers, I have only to say, that, as far as I am individually con-

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cerned, I shall feel most happy to meet your wishes; but, as I am acting for others, I must guard them against loss, should any arise. Previous to leaving Calcutta, I applied to government for liberty to stop at the Cape, but was informed no such indulgence could be granted. On reference to my charter-party, I am forbidden to stop at any port or place, to take in stores, provisions, merchandize, or bullion, or to deviate from my course under any pretence whatever, accidents from stress of weather alone excepted, under a penalty of 1,000*l.* myself, and the same sum to the owners of the vessel, and thirteen guineas per day demurrage for every day the vessel be detained. Under these circumstances, you will not be surprised at my requesting a guarantie, in the event of my being called upon by the Honourable Company for such penalties. You are aware that the Honourable Company has nothing to do with the passengers, and that they could have made me take down every cabin between decks, if they chose. They compel me to make oath that I have water and provisions sufficient for my crew, but take no notice of passengers, having put none on board. I am not in want of any thing for the ship, and we have water to last twenty-five or thirty days more, which will take us to St. Helena, I trust. The season is now so far advanced, that stopping at the Cape is infinitely more dangerous than it would have been a few weeks earlier, and makes it indispensable I should act with great caution, as neither ship nor cargo (both very valuable) are insured, and, in event of accident, ruin must be the consequence to myself, and a severe loss to my employers. I am aware that your daily consumption is very great; but, from the stock now on board, I do not think any inconvenience would be felt, if we reached St. Helena in twenty or twenty-five days. However, this is simply my opinion: you must judge for yourself; all I require is fine weather and your guarantie. At the same time, I must beg to remind you, that, if we go to the Cape, and there should be the slightest appear-

ance of bad weather, I shall proceed immediately to sea, whether by night or day. I trust I need not say how happy I should be to accede to your wishes without the above conditions, if I could do so without the probability of my involving any one in the most serious difficulties. What present provisions and stores I have are much at your service, for the comfort of your passengers, if you should want them; and I beg to assure you, that I have and shall make it my study to render you and them as happy as you can be on board ship. I remain, &c.

James Leader."

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Taddy, Serjt., for the defendant.—The question is, whether there is any breach of contract. *First*, whether there is any covenant on the part of the defendant that he will put into the Cape of Good Hope. I say there is not. The agreement says, that if it shall be necessary for the convenience, and at the request, of the plaintiff to put in at any intermediate port, the plaintiff will pay the port charges. This is not a covenant on the part of the defendant, but only an undertaking by the plaintiff to pay the port charges. But they say there is a covenant by the defendant that he will consult the comfort of the passengers. The captain had many duties to perform: he had a duty to perform to his owners. If he had gone into the harbour the dues must have been paid by the owners. The captain did all that was necessary under the circumstances: he stood in at first, and let some people go on shore before the squall came on; and when it did come on, he stood on and off at a reasonable distance, thereby affording a reasonable communication with the shore; and he was not bound to go into any harbour. Then, as to the water: the contract is, that he will furnish the necessary and *usual* supply of water for the use of the passengers, &c. And the question is not whether at one time there was a small reduction; the question is, whether the defendant put on board the usual quantity; and, if he did, it is a compliance

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with the covenant, although there might be some scarcity in consequence of the extraordinary length of the voyage from Calcutta to the Cape. A captain does not guarantee that the water shall last during the voyage under all circumstances. With respect to the placing of the baggage in the hold, the words are, "in the event of any space being left, and *in that case only*." All the things placed there were the East India Company's, except the chest of cigars, and that alone is not sufficient to ground a breach of covenant, as the plaintiff did not complain of it, and require its removal.

TINDAL, C. J.—There was no obligation on the part of the plaintiff to require the removal of the chest.

Taddy, Serjt.—Then what covenant does it range itself under? The complaint of the passengers was of the rice, and not of the chest; and as the rice was only an inconvenience for two days, it is not sufficient to support the action, as there must in every voyage be such temporary and trifling inconveniences.

On the part of the defendant the fourth mate was called. He stated that there was no deficiency of water till they got near the Cape. That 10,000 gallons were taken on board at Calcutta, which, in his judgment, was sufficient from there to St. Helena. That the voyage was rather long: that there was no diminution of the water for drinking, but for about ten days no water was supplied for washing, except to the ladies, and that the leakage was about 1,000 gallons. With respect to the stowage, he stated that one hundred and fifty bags of rice, which did not belong to the East India Company, were for about ten days placed in the aftermost hold, and then removed; and cuddy stores belonging to the plaintiff, together with some of the baggage, were placed there by his direction. He further stated, that, in the early part of the voyage, application

was made by the plaintiff to the defendant to remove a part of the baggage from the accommodation deck to the hold, but that it could not be done without great inconvenience.

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TINDAL, C. J., (to *Wilde*, Serjt.)—You may go to the jury upon the two points, as to the water, and as to the stowage in the hold. With respect to the going to the Cape, I do not think it is a covenant, though it may be a representation.

Wilde, Serjt., was about to argue the point, when—

TINDAL, C. J., said, the better way will be, if the jury think that any damage has been sustained on that part, that they should find it separately; and, if I am wrong, you may move the Court. At present my impression is against you.

Wilde, Serjt., in reply.—The defendant knew what indulgence he could grant before he entered into the bargain with the plaintiff, and received his money. The contract states that he was fully and absolutely authorized to let. The engagement is, that the plaintiff shall have for the use of his passengers the whole of the space from the stern to the extremity of the sail-room, and a sufficient supply of water and stowage in the hold for the luggage. To be of use to the parties, a stipulation to provide for their comfort must be construed largely, because it is not possible to tell all the various circumstances that may arise in the course of a long voyage. Why did the defendant stipulate that the plaintiff should pay port charges, if he was not bound to go into a port upon request? It is clear, on the whole of the evidence, that the defendant occupied for his own advantage the part of the hold not occupied by the East India Company. Also, it was a substantial inconvenience to the passengers to have walls of luggage between the cabins, preventing the proper circulation of air. As to the going

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into the Cape, other ships went in and anchored, why did not the defendant; was he the only person who did his duty to his owner? It must have been an inconvenience to take sheep on board, at such a distance out, with the wind fresh. The captain says, in one of his letters: "I want nothing; you may have eight hours to go in." He also says, "I applied to government for leave to touch at the Cape, and could not get permission; and there is a clause in the charter-party forbidding me to stop at the Cape for stores, or any thing else." But these things could not apply to a case of necessity affecting the health of the passengers. In such a case, the charter-party must yield. As to the harbour dues, the plaintiff had agreed to pay them, and the owners would not have been liable. After the representation of the passengers, and the way in which it was met, you will find a verdict for the plaintiff, for such reasonable damages as you think the justice of the case requires, considering the difficulty of proving the pecuniary damage sustained.

TINDAL, C. J.—This is an action of covenant brought by Captain Corbyn against Captain Leader, and you will have to say, whether certain covenants set out in the declaration have been broken, and, if they have, then to what amount the plaintiff has sustained damage. The agreement is dated in December, 1831. Certainly it is an agreement not of a usual kind. There is a charter-party which is said to be at variance with it. If the defendant's charter-party invade his power of fulfilling his agreement, that is his own concern, and does not affect the question between him and the plaintiff; one of the questions will be, whether the defendant did, during the progress of the voyage, keep up a supply of the necessary and usual quantity of water. Certainly the covenant would not be broken by the want of water for a short time, arising from the length of the voyage, because a captain does not guarantee that a voyage shall only last a certain time. The question

upon this point is, whether at the Cape there was an opportunity of obtaining a sufficient quantity of water to keep up the usual supply. It is clear that water might have been obtained by the defendant, because, in point of fact, it was obtained by the plaintiff. And it does seem to me, that it was a breach of the defendant's covenant, when he had the opportunity of getting water, that he did not do so, but exposed his passengers to the inconvenience of a scanty supply. He might have put in as other ships did, or he might have stood off, and obtained water. As far as the evidence goes, the plaintiff obtained the water, and has had to bear an expence which he ought not to have sustained. The next breach is as to the hold. The covenant is not absolute, but conditional; therefore, the first question will be, was there room to stow away the luggage, after the cargo had been sent in by the East India Company. The words are, that the defendant will *permit and suffer* the plaintiff to occupy it. This fairly imports that there should be some request or demand on the subject. One of the witnesses proves that there was a request soon after the vessel left Calcutta. Therefore you will consider whether there was in fact the space left. This depends upon contradictory evidence, on which you must exercise your judgment. And also whether, on the representation of the plaintiff, a removal of the rice into the sail-room took place, and part of the luggage was placed in the hold in its stead. There is contradictory evidence upon this point also. Then, with respect to the third covenant, as to putting into an intermediate port. No person can doubt that it was the intention of the parties, that on request by the plaintiff, for the benefit of the passengers, the defendant should put into an intermediate port, though it may not amount to a covenant in law. But assuming it to be a covenant in point of law, it was clearly broken; for the defendant, when requested, refused to put into the Cape of Good Hope. Therefore you will find what damages you think right, keeping it separate

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from any damages you give on the other parts of the case. You will say what damage the plaintiff has sustained from the defendant's not furnishing the proper supply of water; *secondly*, from his not being allowed the use of the hold for the luggage; and *thirdly*, from the defendant's not putting into the Cape, that he might get stock, &c.

Verdict for the plaintiff, 125*l.*: being 50*l.* on the first; 25*l.* on the second; and 50*l.* on the third breaches.

Wilde, Serjt., and *Cottingham*, for the plaintiff.

Taddy, Serjt., and *J. H. Lloyd*, for the defendant.

[Attornies—*Todd*, and *Davis & R.*]

IN the ensuing term, a rule was obtained upon the point reserved at the trial; and the Court after argument were of opinion, that there was sufficient to constitute an implied covenant on the part of the defendant to put into an intermediate port. The verdict therefore was sustained for the whole amount of damages.

Adjourned Sittings at Westminster, after Trinity Term,
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BEFORE MR. JUSTICE PARK,
 (Who sat for the Lord Chief Justice.)

CUNNINGHAM and Another v. FONBLANQUE.

June 16th.

Semble, that there is in fact a usage of trade between the printers and proprietors of news-

ASSUMPSIT.—The first count of the declaration stated, that the plaintiffs exercised and carried on the business and employment of printers and compositors, that the latter should give to the former four weeks' notice of taking the work from them, or pay them four weeks' wages; but such usage seems not to be mutual.

An usage of trade must be proved by instances, and cannot be supported by evidence of opinion merely.

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and the defendant was the proprietor and publisher of a certain newspaper; and, on the 1st of January, 1832, in consideration that the plaintiffs, at the special instance and request of the defendant, would enter into his service and employ in and about the composing and setting up of the types of the said newspaper for the printing and publishing thereof, at certain weekly wages, the defendant undertook to retain and employ them, and to continue them in such service and employment until the expiration of four weeks after notice given by the plaintiffs or the defendant to the other, of an intention to put an end to the employment, or else to pay the plaintiffs their wages for four weeks. It then averred that, although the plaintiffs entered into the employ, and continued in it for some time, and had been always ready and willing to continue till the end of four weeks after notice, yet the defendant did not continue till that time, but, on the contrary, did not give them notice, but discharged them without any notice whatever, and also refused to pay them four weeks' wages instead. There were, also, counts for work and labour, &c. Plea—General issue.

The items of demand in dispute were those which in the particular of demand were thus described :—

	£	s.	d.
" For composing 2774 lines of minion, not inserted, proofs of which were sent - -	9	3	0
" For composing 469 lines of bourgeois, not inserted, proofs of which were sent - -	1	17	6
" The defendant discontinued employing the plaintiffs in and about the composing and setting up of the types of the newspaper mentioned in the declaration in this cause, without giving four weeks' notice of his intention so to do; the plaintiffs, therefore, claim and demand to be paid for four weeks' wages, profits, and advantages, the sum of - - - - -	53	0	0"

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It appeared that the defendant was the proprietor of the Examiner newspaper, and the plaintiffs, who were printers, were employed to set the types of it, and that there was every week a quantity of what is called overset matter, of which proofs were sent to the defendant. The amount of the charge for this was admitted to be 11*l.* 0*s.* 6*d.*, as mentioned in the particulars of demand.

With respect to the usage, the printer of the John Bull newspaper was called on the part of the plaintiffs. He stated that he had been acquainted with the printing of newspapers for thirty years past. He was asked whether there was any usage of trade as to the terms with respect to giving notice before the employment of the printer could cease.

Talfourd, Serjt., for the defendant, objected, that the cases where evidence of usage was admissible, were, *first*, the law of merchants; and, *secondly*, where a contract was ambiguous, and both parties to it were in the same trade. He contended, that, as the defendant was a stranger to the trade of a printer, unless the usage were brought home to him, it was not admissible in evidence.

Jones, Serjt., for the defendant, submitted, that the only way of shewing an implied contract was by evidence of usage.

PARK, J., was of opinion that the evidence was not admissible; but said he would receive it, and give leave for a motion to enter a nonsuit. His lordship intimated that there could not be any usage with respect to Sunday newspapers, as they had only existed for a short time.

The witness then stated, that, according to his understanding, unless a special contract be proved, the

printer of a newspaper is entitled to four weeks' notice from the proprietor. Several other witnesses were called, who stated that they understood the usage to be that four weeks' notice was given on either side, and they stated several instances in which such notice had been given by the proprietors to the printer, but none could produce any instance in which it had been given by the printer to the proprietor (a). They also said that it would be attended with great practical inconvenience to both parties if such a contract were put an end to without notice.

On the part of the defendant it was proved, that, with respect to oversight matter, the defendant desired that slips might be kept, and said if it came to any thing considerable, he would make the plaintiffs a remuneration at the end of six or twelve months. Several accounts were delivered by the plaintiffs, not making any mention of oversight matter; and it appeared, also, that the defendant took away the printing from the plaintiffs in consequence of their being so late in the printing that the publication was delayed, and the defendant, being in consequence, obliged to pay the postage of nearly all the number which were sent out, besides losing the sale of a considerable quantity. The defendant had frequently remonstrated with the plaintiffs on their delay, and in one note which he sent told them, that, if it occurred again, he should consider that a final

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(a) In Burrow's Reports, Vol. 2, p. 1228, it is said, "The custom of merchants is part of the law of England, and courts of law must take notice of it as such. There may, indeed, be some questions depending upon customs amongst merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet, that is only where the law remains doubtful; and even there the custom must be proved by *facts*, not

by *opinion* only." In the case of *Savill v. Barchard*, 4 Esp. N.P.C. 53, several witnesses were called to prove a usage in the trade of a dyer, some of them said that they always understood it to be the practice of the trade, but not being able to prove any particular instance in which it had been asserted, Lord Kenyon said that their evidence went for nothing. See the cases of *Wood v. Wood*, ante, Vol. 1, p. 59, and *Bleaden v. Hancock*, ante, Vol. 4, p. 152.

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notice, and remove the paper instanter. The plaintiffs sent in a bill about three weeks after their dismissal, which did not contain any claim for wages in lieu of notice.

Jones, Serjt., in reply.—With respect to the four weeks' notice, I do not understand a custom in law as in a manor, but a usage in a particular business, which all persons in that business must be taken to understand, and upon which they must be considered to act. The printer and proprietor of a newspaper, no special contract being made, must be taken to contract upon the terms which regulate the dealings between printers and proprietors. Antiquity is not necessary to establish the usage I contend for, because new professions and trades may arise. As to the four weeks' notice, it is important to the printer, who has to give notice to his own men, and also to the proprietor of a paper, who would be greatly inconvenienced by its being suddenly given up by the printer. The defendant knew that the previous printer had required a notice, and only for a particular reason did not go to law about it, and he did not make any exception in his agreement with the plaintiffs. He also said, "If the delay occurs again, I shall consider this as final notice." That shews he must have been aware that but for that he would have been bound to give longer notice. As to the oversight matter it appears that slips were regularly kept.

PARK, J., (in summing up), *inter alia* said—I adhere to the opinion I at first expressed, and think still that there is not a colour or pretence for the question that was put as to the usage. But I said I would not nonsuit; and therefore you may assume that such a usage as that contended for is legal. The question for you will be, whether the usage is, in point of fact, proved? There is a special contract specially stated in the declaration, and the plaintiff must, to support his declaration, prove the usage exactly as he has laid it. This he has not done. In the de-

claration it is stated, that the notice is to be given by the printer or proprietor, as the case may be. Now, there is not a single witness who has proved the reciprocity of the practice; that is, by instances. Two witnesses stated it, but did not produce any instances. But did the plaintiffs themselves consider it as a usage? If they did, how is it that they did not insist upon the notice at the time, nor for some time after? If a servant robs his master, he may, though a month's notice is required, dismiss him without any notice, and need not pay him a month's wages; and if he is negligent in his business and injures his master, I am not prepared to say that the master may not dismiss him, as, if he were kept, it might be very injurious, as he might do the business very carelessly when he knew he was not to be kept longer. And with respect to the oversight matter, the substance of the evidence is, that the defendant said, "Keep the slips, and if there is any thing considerable, I will make you compensation;" not, I will pay. This is not a matter upon which an action may be brought. His Lordship observed on the absence of demand, and on the sending in of accounts not containing the charge, and left the question of usage to the jury, who found for the plaintiffs.

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Damages 64*l.*, thereby establishing the existence of the usage.

Jones, Serjt., and *Kelly*, for the plaintiffs.

Talfourd, Serjt., and *Butt*, for the defendant.

[Attornies—*Hodgson & B.*, and *Brundrett & Co.*]

A RULE nisi was obtained in the ensuing Michaelmas Term for a nonsuit or a new trial, which, after argument, was thus modified. It was made absolute for reducing the verdict for the plaintiffs to the sum of 11*l.* 0*s.* 6*d.*, being the charge for oversight matter, and for entering a verdict for the defendant on the counts relating to the usage.

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June 16th.

In an action on the case for laying a complaint before a magistrate of threatening language, in consequence of which the plaintiff was taken into custody and imprisoned till he found bail, if it appear that the threat was used in consequence of a private dispute, and was not uttered to the defendant, but related to him by a servant, who gave evidence of it before the magistrate, the question for the jury will be, whether the defendant acted *bonâ fide* upon the threat mentioned to him, or merely used it as a pretext for accomplishing his own private purposes.

VENAFRA v. JOHNSON, Clerk.

CASE.—The declaration stated that the defendant swore that he feared the plaintiff would do him some grievous bodily harm, and in consequence he was obliged to find security to keep the peace, and was imprisoned till he had procured it.

The plaintiff, who was a teacher of dancing, became tenant to the defendant of part of a house in Regent-street. The plaintiff wished to have a subscription ball there, to which the defendant objected, contending that it was not within the terms upon which he let the premises to the plaintiff. The plaintiff, however, had some bills printed, notifying that such a ball would take place; and had one of them put up at a window of the house. The defendant seeing it, pulled it down; in consequence of which the plaintiff said something to a person named Davis, who lived in the house, and was in the employ of the defendant, which Davis understood to be, that he, the plaintiff, would lose half his blood but Mr. Johnson should have it. This being communicated by Davis to the defendant, he went before a magistrate, and when there, Davis swore that he heard the plaintiff menace Mr. Johnson, by saying that he would lose half his blood but Mr. Johnson should have it; and the defendant swore that he believed from the information of Davis, that the plaintiff would do him some grievous bodily harm. In consequence of this a warrant was issued for the apprehension of the plaintiff, and he was taken before the magistrate. When there, he told the magistrate, that, being rather angry at the defendant's having pulled down his bill, he said to Davis, not what Davis had sworn, but this—"Does Mr. Johnson want me to pay rent and keep the room for nothing but to walk up and down in, and to lose all my connexion. I must not lose my connexion; and if Mr. Johnson takes all my money, he might as well take all my blood." The magistrate upon

this advised the parties to retire and settle the matter. They went out, and the defendant proposed to liberate the plaintiff upon his undertaking to pay the rent up to the next quarter-day, and to take away his things by four o'clock that afternoon. The plaintiff refused this offer, and was put into a room adjoining the magistrate's office. A modification of the terms proposed was afterwards agreed to, but the defendant went out of town without communicating it to the magistrate, and the plaintiff was, therefore, taken in the evening to prison, where he remained all night, and was liberated the next day on finding bail.

A witness, named Goddard, proved at the trial that the defendant told him he wanted to abate the nuisance arising from the plaintiff's advertising subscription balls to be held at his house.

Jones, Serjt., for the defendant.—The plaintiff must be nonsuited. The evidence is only this: a dispute arises concerning a house; and a person, named Davis, mentions to the defendant certain words which he heard, and which the defendant does not pretend to have heard. The magistrate puts his construction upon the words proved. There is no evidence of want of reasonable and probable cause. *Willans v. Taylor (a)*, is the last authority upon this subject. In fact, on the plaintiff's case reasonable and probable cause is shewn to have existed.

Spankie, Serjt., for the plaintiff.—Enough has been proved to send the case to the jury, for them to say, whether the defendant's motive was a fear resulting from Davis's statement—whether he put forward the threat

(a) 6 Bing. 183, and 3 Moore & Payne, 350. "In an action on the case for maliciously indicting the plaintiff for perjury, malice and a want of probable cause in the defendant must concur; and the

plaintiff must produce some evidence to shew a want of probable cause before he can call upon the defendant to prove the affirmative, and shew that he had reasonable and probable cause."

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bonâ fide, or merely used it as a pretext. According to the statement of Goddard, his object was, as he said, to abate the nuisance. With respect to malice, it is to be inferred from the facts. If a man inflicts an injury on another contrary to law, and with the view of accomplishing his own purposes, it shews the existence of malice in point of law.

Moody, on the same side.—The object contemplated was of a private nature. There might be enough to constitute probable cause, had it been the case of a public prosecution; but not, as it was the case of a private injury. The words are so loose and minute, that it will be for the jury to say whether the defendant did in fact draw the inference that the plaintiff intended to injure him.

Jones, Serjt., in reply.—There must be malice, and the want of reasonable and probable cause.

PARK, J.—The circumstances of this case are very uncommon. I do not remember any such state of facts before; but I am inclined to say, that, as it now stands, this action will not lie; and I say so for this reason—It appears that Mr. Johnson did not set the matter going; he only acted upon the statement of his servant. I have looked through the depositions, and from the beginning to the end I find not one word of any requisition on the part of Mr. Johnson to obtain a warrant. I am very much surprised that the magistrate should have granted a warrant upon such a statement, particularly as he afterwards advised the parties to settle it. It seems that the defendant told the plaintiff to bring his witnesses, and altogether it was treated as more of a civil proceeding than any thing else. The complaint should have been dismissed. The defendant might think that the magistrate could settle the civil question between them. I think the whole of this proceeding is the act of the magistrate, and therefore the plaintiff must be called.

Spankie, Serjt., intimated that he should appear.

PARK, J., then directed the jury that there was probable cause, and that they must find their verdict for the defendant in point of law.

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Spankie, Serjt., was at first about to tender a bill of exceptions; but afterwards, to save expense, consented to be nonsuited.

Spankie, Serjt., and *Moody*, for the plaintiff.

Jones, Serjt., for the defendant.

[Attornies—R. W. Williams, and J. H. Webber].

A RULE nisi for a new trial was afterwards granted, and made absolute in this case, the Court considering, with the concurrence of Mr. Justice *Park*, that the facts should have been left to the jury. The case was afterwards tried before Mr. Justice *Gaselee*, at the Sittings in Hilary Term, 1834, and the jury found for the plaintiff,

Damages—100*l*.

In the course of the same Term, a rule nisi for setting aside this verdict was obtained, on the ground that it was against evidence, and that the damages were excessive.

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Adjourned Sittings in London, after Trinity Term.

BEFORE MR. JUSTICE ALDERSON.

(Who sat for the Lord Chief Justice.)

June 25th.

DEAN v. HOGG and LEWIS.

A. hired a steam-boat for the day, to convey himself and others, not exceeding fifty in number, on an excursion. The captain, steward, and crew, were the servants of and paid by the proprietor. A stranger, not of the party, was allowed to come on board by the captain; and being desired to quit, refused, whereupon A., with the assistance of others, removed him by force:—*Held*, that A. had not such possession of the vessel as justified them in so doing.

ASSAULT, with several special pleas of justification. That one of the defendants was possessed of a certain steam vessel into which the plaintiff intruded, and he gently laid hands on him to remove him, and the other defendant assisted. Replication of excess as to the justification, which was pleaded to the third count, which alleged a tearing of the plaintiff's clothes; and *de injuriâ* to the other special pleas.

From the evidence on the part of the plaintiff, it appeared that he was desirous of going to Richmond with a friend; and being too late for the regular steam boat, they hired a wherry, and, when they had got as far as Whitehall, they saw the Queen Adelaide steamer, and inquired where it was going. The captain replied to "Richmond." The plaintiff said that is the very thing we want. They were going on board, when the captain said "Do you belong to the party? The plaintiff said, "Party, what party? we are by ourselves." The captain said, "Very well, you may come on board—the fare is 1s. 6d. a piece." The plaintiff and his friend then went on board, and walked about, and soon after observed servants coming with provisions in baskets, which led them to think that the boat was engaged for a private party. The plaintiff was looking towards the shore, when a gentleman, who had been giving directions, and appeared to be one of the managers, came up to the plaintiff's friend, and said "I hope you gentlemen have not left any of your party behind." To which the reply was, "No, sir, we have not left any of our party behind; I am very sorry we are here;

I am afraid we are intruders: we were not aware when we came on board, that it was a private party." The gentleman made answer, "You are not at all intruding." The steam boat then went on, and nothing particular occurred till it arrived near Putney Bridge, when the defendants, Lewis and another person, said, in a loud tone, "There are strangers on board," and advanced towards the plaintiff and his friend, and asked them if they belonged to the party. They said, No, but they had explained to a gentleman who appeared to be a manager. Angry words passed between the parties. The plaintiff and his friend were several times told, that they had no business there, and that if they did not go, they would be compelled by force to leave, and eventually a wherry was called, and they were forced into it by the defendants and others. The plaintiff seated himself, and refused to move, and in the act of forcing him away, it appeared that his clothes were much torn.

Spankie, Serjt., for the defendants.—To the third count for tearing the plaintiff's clothes, we justify as in possession of the vessel, and they reply excess, which admits the possession. The defendants were in fact in the possession of the vessel. Want of civility and courtesy in the manner of desiring the plaintiff to depart, is no ground of action, if he had no business there. I apprehend that Lewis had the exclusive right of possession for that day; the object is the exclusion of persons not of the party invited. The same rule applies to a steam boat as to a coach, or a room in a tavern. A letter was written by the proprietor of the steam boat to the defendant Lewis, ten days before the day in question, letting the boat for 5*l.* 10*s.*, the party not exceeding fifty persons, and 20*s.* to the steward for glass, &c. The captain had no right to engage passengers. The plaintiff ought to have inquired who was the person who had hired the boat. He should also have explained to any person having authority at any

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time afterwards. The question is not whether there was a want of delicacy in the mode of requesting the plaintiff to retire, but whether the plaintiff had any right to be there. As to the violence, it is impossible to calculate, with any degree of nicety, the exact quantum of force necessary to overcome resistance. It is not pretended that any blow was struck; the clothes would necessarily be torn in the attempt to remove. The real question is, whether the force was justifiable; and if it was, there must be a manifest intention to do one thing, under the pretence of doing another—the object of putting out must be used as a pretext for indulging revenge and cruelty, to constitute what in law is called excess. It appears that the plaintiff was sitting, and more force was of course necessary in order to lift him up.

ALDERSON, J.—How do you make out your right of possession? The captain was in possession of the vessel under a particular contract.

Spankie, Serjt.—We had possession of the vessel, together with the use of the servants. It is similar to the case of a coachman.

Addison, on the same side.—There is only one assault, therefore the plaintiff's counsel must elect which counts he will go upon. The question of excess is not raised upon the first pleas.

ALDERSON, J.—If you do not mean to call witnesses, I will put my brother *Wilde* to elect now. If you do, I will put him to elect afterwards.

On the part of the defendants, the letter from the proprietor of the steam boat, referred to in the argument of *Spankie*, Serjt., was put in. It was as follows: "I have seen the steward, and in consequence I note the *Adelaide* as engaged for you for Richmond or Twickenham on

Thursday the 24th instant, at the hire for the day of 5*l.* 10*s.*, your party not exceeding fifty persons."

The person who wrote the letter was called as a witness, and stated that the captain was hired by him to navigate the vessel at 6*s.* for the day, as were the other men and the steward also. The witness was about to state the reason why he had limited the party to fifty persons, but—

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ALDERSON, J., refused to hear it, saying it was for him to construe the written instrument. His lordship added, there is no doubt that the plaintiff had no right there; the question is, who had the right to turn him out.

Witnesses were also called, who contradicted the statements made by the plaintiff's witness, as to the mode of questioning him to retire, and the quantum of violence used.

Wilde, Serjt., then elected to abandon the third count; and, in reply, said—As to the right of possession, supposing there had been a running down, could it be said that the defendants were answerable, as being in possession, and not the captain? If an individual hires a vessel for a week, and hires and pays the men, he is in possession; but not so if the men who navigate it are the servants of the proprietor. It is only *the use* which he has in such a case, as if you take the inside of a coach. And when parties have got into a vessel under such circumstances as this plaintiff, they are not to be turned out after they have proceeded a considerable distance on the passage.

ALDERSON, J., (in summing up), said—The first question for your consideration is, whether the defendants have justified the assault which has been proved. The way in which they justify is, that the defendant Lewis was possessed of a certain steam vessel, and that the plaintiff was unlawfully there, and, being requested, refused to

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leave, whereupon Lewis removed him, and the other defendant assisted him in doing so. You need not consider whether they used too much violence, as the plaintiff has not taken issue upon that point. In point of law, I inform you that Lewis was not justified as in possession of the vessel, and therefore you will find your verdict for the plaintiff. But you must, in considering the damages, take all the circumstances into your consideration; and, if you think that the defendants were in substance justified, then you should find your verdict for a farthing damages. But, if you think that they were not in substance justified, then you will give such damages as you think the plaintiff is entitled to. His Lordship read over the evidence, and left the conflicting testimony to be decided on by the jury, who found a verdict for the plaintiff—

Damages 10*l*.

Wilde, Serjt., and *Miller*, for the plaintiff.

Spankie, Serjt., and *Addison*, for the defendants.

[Attornies—*Dean*, and *Vincent*].

A RULE nisi for setting aside this verdict was obtained, which, after argument, and time taken to consider, was

Discharged.

June 27*th*.

Hat bodies, which are made partly of the soft substance which is taken from the skin of rabbits, and partly from the wool of sheep, do not come under the description of *furs* in the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68.

MAYHEW and Another v. NELSON and Others.

CASE against the defendants, as proprietors of the Monarch Coach, to recover the value of a quantity of hat bodies, which were to be conveyed from Keynsham, near Bristol, to London, and which were lost on the journey.

It was proved that inquiry was made at Keynsham of the coachman, as to what had become of the parcel, and his ply was, that he understood it had been lost.

Adams, Serjt., for the defendants, objected, that what the coachman said was not evidence.

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TINDAL, C. J., was of opinion that it was.

A witness stated, that the hat bodies were made of wool, about half of sheeps' and half of rabbits' wool, and that there was not any hair in them at all. Another witness said, that they were called "felt."

Adams, Serjt., referred to the statute 11 Geo. 4 & 1 Will. 4, c. 68, s. 1, which enacts, that carriers shall not be liable for a variety of articles, including "furs," if they exceed ten pounds' value, unless the value and nature are declared at the time. And he contended that the hat bodies came under the description of furs, as they were made partly of the fur which came from the back of a rabbit. He cited different definitions and examples from Johnson's Dictionary (*a*).

Wilde, Serjt., for the plaintiffs.—It is not fur, but wool, when it is taken off the skin.

TINDAL, C. J.—Look at the words of the statute, and consider whether it does not mean articles made entirely of fur, and not articles in which there is only a portion of fur. The statute speaks of *silks* in a manufactured or unmanufactured state, and whether wrought up or not wrought

(*a*) One of the examples was—"Tis but the dressing of a bird of prey in his cap and furs, to make a Judge of him." There are three definitions of fur given in Johnson's Dictionary:—1st, "Skin with soft hair, with which garments are lined for warmth."—Swift. 2nd, "Soft hair of beasts

found in cold countries; hair in general."—Ray. 3rd, "Any moisture exhaled to such a degree as that the remainder sticks on the part." It is derived from the French word *fourrure*, which, according to Boyer, is "*Peau passée et garnie de son poil*"—"Skin dressed with the hair on."

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up with other materials; but it mentions *furs*, without any such provision.

Adams, Serjt.—That is the only thing which creates any doubt in my mind upon the subject.

TINDAL, C. J.—I confess that it creates a very strong doubt in my mind; but you shall have leave to move.

His Lordship left it to the jury to say, whether, on the evidence, they thought that the hat bodies were made of fur or not.

The jury said they were of opinion that they were made of wool.

Verdict for the plaintiffs, subject to a reference as to the amount.

Wilde, Serjt., and *Wightman*, for the plaintiffs.

Adams, Serjt., for the defendants.

[Attornies—*T. B. Cox*, and *Young*].

BOSWELL and Another, Executors of BOSWELL, deceased,
v. SMITH and Others.

June 27th.

A. had a claim on B., C., and D. Several months afterwards, B. signed a check for a larger sum, in the name of himself and C. and D., as his partners, which

ASSUMPSIT for goods sold and delivered. Plea—the general issue, with a notice of set-off.

The plaintiff claimed a sum of 32*l.* 1*s.* 6*d.*, being the balance of an account for the price of a cart made for the defendants in the month of August, 1831.

was proved to have passed through the hands of A., and to have been appropriated by him to his own purposes. A. died:—*Held*, in an action by his executors against the three partners for the original claim, that the check, *prima facie*, was evidence of payment; but, there being other circumstances from which a loan of its amount might be *inferred*, it was left to the jury to say whether it was a loan by B. alone, or by the partnership, although no memorandum or acknowledgment of any kind was produced, by which the executors could ascertain whether it was a loan.

On the part of the defendants, *Wilde*, Serjt., produced a check drawn by the defendant Smith in the name of the defendants Smith, Rackham, and Puest, who were partners. It was dated 14th November, 1831, and it was proved that the deceased wrote his name upon the back. It was also proved that, a friend of his having asked him for the sum of 80*l.*, which he owed him, he brought him the check in question, and received the difference of 20*l.* It appeared that the deceased died suddenly, on the 6th of January, 1832. On the 31st of January, 1832, the defendant Smith wrote the following letter to one of the plaintiffs, who was the son of the deceased:—"Sir, It is a fortnight to-day since I called upon you relative to the business *I had with your father* respecting the hundred pounds borrowed by him on the 14th of November last. I did expect to have heard from you before this, for my partners are very anxious this should be settled, it being a borrowed-money business; and, from the well-known punctuality of your father, I have very little doubt but that he had made all the necessary arrangements, &c." The letter also contained this passage:—"You must admit it is very unpleasant to me, my partners allowing me to draw the money out upon my own responsibility; and I assure you they felt the disappointment very great." Smith also wrote another letter on the 2nd of February, which was throughout in the first person, no mention being made of the partners.

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Wilde, Serjt., for the defendants, relied upon the check, as shewing a loan by the partnership to the deceased.

Jones, Serjt., for the plaintiffs.—The plaintiffs are executors, and the duty of executors is to claim all that they find due to the estate. As to the hundred pounds, the question is, whether the executors must not be satisfied that it was a loan, before they can allow it in account. If it were a loan, where is the memorandum or acknowledg-

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ment of it? What man is safe, or what man's estate is safe, if a check traced into his hands, which may have got there in various modes, is to be evidence of a *loan*. Lord Kenyon said, in the case of *Cary v. Gerrish* (a), that a check was not evidence to establish a debt, as no proof was offered of the circumstances under which it was given. The testator being dead, what can the executors do? If any single voucher, or any entry in any book could be shewn, they would pay the money, but without the production of some such evidence, they would not be justified. If it was, as is contended, a *partnership loan*, would not some one of the partners have required some memorandum or acknowledgment?

TINDAL, C. J., in summing up, said—The plaintiffs in the first instance proved their case. The defendants proved, that, after the delivery of the goods, a check for

(a) 4 Esp. 9. That was an action by executors for money lent by their testator. The only evidence was a check, the amount of which was proved to have been paid to the defendant himself out of the testator's funds. Lord Kenyon said—"This is no evidence to establish a debt. No evidence is offered of the circumstances under which the draft was given. It might be in payment of a debt due by the testator, or the defendant might have given cash for it at the time. If the plaintiff had shewn any money transactions between the testator and the defendant, from which a loan could be inferred, or any application to borrow money at the time, that, coupled with the giving the draft, might be evidence to go to a jury; but, standing a naked transaction, as this does, it is not evi-

dence, and the plaintiff must be nonsuited." In the case of *Aubert v. Walsh & Another*, 4 Taunt. 293, a set-off was pleaded; and, to support it, various checks given by the defendants to the plaintiff, and paid by the bankers to him, were proved. There had been many transactions between the parties to a considerable amount. On the part of the plaintiff it was objected, that the checks were not sufficient evidence of the set-off, without proof of the circumstances under which they were given. The verdict was for the plaintiff, disallowing the set-off, and a rule nisi for a new trial was discharged; and Chambre, J., observed, on the point as to the checks—"All our accounts would be in inextricable confusion if such evidence were allowed." See also the case of *Egg v. Barnett*, 3 Esp. 196.

100*l.* was given to the deceased. *Prima facie*, the delivery of the check is evidence of payment, and, if it had stopped there, it would have been complete as payment of the 32*l.*, and something more. Then the letters are put in; and after that, I think it cannot be said that it was not a loan. And the only question for you will be, whether it was a loan by the one defendant, Smith, or by the three defendants, as partners. There is no doubt that Smith was the person who originally managed the transaction. The phrase in the letter—"My partners are very anxious, it being a borrowed-money business," is a part which seems to shew that it was a partnership concern. But then there are the words, "on my own responsibility." What you will have to say is, whether Smith drew the money out, and afterwards made it a transaction between Boswell and himself, or whether the other defendants assented to it, as a partnership transaction. The letter also says—"they felt the disappointment very great." This would rather seem as if the three partners expected to receive the money back, whereas, from the first part of the letter, the transaction seems personal and individual. It seems that the check was paid out of the partnership funds.

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His Lordship left the case to the jury, who found a

Verdict for the plaintiffs, 32*l.* 1*s.* 6*d.*

Jones, Serjt., and *Payne*, for the plaintiffs.

Wilde, Serjt., and *Theobald*, for the defendants.

[Attornies—*Thomson*, and *Brutton & Clipperton*].

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July 6th.

CARTER v. JONES.

The fifteen Judges have made a resolution that the plaintiff shall begin on the trial in all actions for personal injuries, libel, and slander, although the general issue may not be pleaded, and the affirmative be on the defendant.

LIBEL.—There were pleas of justification, that the alleged libel was true, but no plea of the general issue.

Platt, for the plaintiff, having opened the pleadings—

Wilde, Serjt., for the plaintiff, stated that he understood that the Judges had lately taken into consideration the practice respecting the defendant's counsel beginning to address the jury where the general issue was not pleaded, and the affirmative of the issue lay on the defendant, and that the Judges had resolved that the plaintiff, in such cases, should in future begin.

Hill, for the defendant, said, that he had never heard of any such resolution of the Judges; and that, whether it existed or not, the present defendant having regulated his pleadings by the existing practice, he trusted the rule would not be applied *ex post facto*. The defendant in the present case had lost the benefit of putting in issue the introductory allegations in the declaration, by not pleading the general issue, which would have compelled the plaintiff to have called witnesses, who would have been of use to the defendant. It would, therefore, be a great hardship on the defendant, who had waived many advantages to obtain the benefit of the existing practice, now, by a surprise upon him, to adopt a new rule.

TINDAL, C. J.—The Judges certainly have come to a resolution that justice would be better administered by altering the rule of practice in the respect alluded to, and that, in future, the plaintiff should begin in all actions for personal injuries, and also in slander and libel, notwithstanding the general issue may not be pleaded, and the

affirmative be on the defendant. I do not see any hardship in the rule, as it is most reasonable that the plaintiff, who brings the case into Court, should be heard first to state his complaint. I therefore feel bound, on the present occasion, to act upon the rule which the Judges have determined to adopt (a).

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Wilde, Serjt., opened his whole case, and went into evidence to disprove the defendant's pleas of justification.

Hill, for the defendant, addressed the jury, stating that his client had been misled, and that he was satisfied that the imputations were unfounded; whereupon

Wilde, Serjt., said, that, as the defendant was a poor man, unable to pay either damages or costs, the plaintiff would accept nominal damages.

Verdict for the plaintiff, damages 40s.

TINDAL, C. J., certified for the special jury.

Wilde, Serjt., and *Platt*, for the plaintiff.

Hill and *Kelly*, for the defendant.

[Attornies—*F. W. Carter*, and *Treherne & W.*]

(a) We have reason to believe that the Judges are considering whether the rule should not be extended, so as to entitle the plaintiff to begin in all cases.

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July 8th.

An attorney ought not to prepare a bail-bond for a larger sum than is requisite according to the practice of the Court.

WINGRAVE *v.* GODMOND, Gent.

CASE for negligence.—It became necessary to give in evidence a bail-bond, the debt in the action on which it was given was 105*l.* 4*s.*, and the bond was in 300*l.* The attorney who prepared it, being called as a witness, was asked how he came to make the penalty so large; he replied that he had not any particular reason for it.

TINDAL, C. J.—You had very good reason against it. You should not make people find bail for a larger sum than is necessary, according to the practice of the Court. It is a very careless and very improper thing. But it might have been set right at the time.

The cause was afterwards arranged.

Wilde, Serjt., and *Wightman*, for the plaintiff.

Jones, Serjt., for the defendant.

[Attornies—*H. Berry*, and *In Person*].

COURT OF EXCHEQUER

Sitting in London in Easter Term, 1833.

BEFORE MR. BARON VAUGHAN.

RICKETT *v.* TULLICK.

April 22nd.

A tenant of apartments is not justified in quitting without notice, merely from a fear, however reasonable, that his goods may be seized for his landlord's rent.

ASSUMPSIT for rent, under an agreement dated 25th June, 1831. The rent had been paid up to Michaelmas, 1832, and the plaintiff sought to recover the quarter up to Christmas in that year. The agreement required three months' notice of quitting, which the defendant did not give. On the cross-examination of one of the plaintiff's witnesses, it appeared that the plaintiff's landlords, on the

6th of October, put in a distress for rent due to them from the plaintiff, but the matter was settled without taking any thing away. The defendant removed the principal part of his goods, and no attempt was made on the part of the broker to stop any of them. The cross-examination was continuing for the purpose of shewing that a distress for former rent had been put in some time before.

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VAUGHAN, B.—That can make no difference unless you shew that it amounted to an eviction, so that you could not occupy the premises.

Some correspondence passed between the parties, in which the defendant did not say any thing about the distress, but spoke of some other reason for quitting.

Shee, for the defendant.—The plaintiff is not entitled to recover any thing from the defendant. In letting the premises, under the circumstances in which he was placed, he committed a gross fraud. He was deeply in debt to his landlord and for king's taxes; and, though there was not actually an eviction, yet there was such a reasonable dread of an eviction that the defendant had not the beneficial occupation of the premises. *Partridge v. Sowerby* (a). The defendant had reason to apprehend that his furniture would not be safe; and it was of the utmost consequence to him to preserve it, as he was only an attorney's clerk, at a small salary.

On the part of the defendant it was proved, that, shortly before the 1st of October, 1832, the defendant's wife told the plaintiff that she was unhappy about the furniture,

(a) 3 Bos. & Pul. 172. In that case, A. agreed to underlet his house to B., the latter paying for the furniture at an appraisement: Held, that B. was excused from the performance of the agreement, because A. at the time he quitted the house, was in arrear for rent to his landlord.

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and if he would satisfy her that it was safe she would take his word. The plaintiff said, that if they did not feel themselves satisfied they had better go; at all events, if the worst came to the worst, they could replevy. To this she replied that she had no money for law. It was also proved that the plaintiff acknowledged that he owed a year's rent and three quarters' taxes. The defendant removed his goods on the 2nd of October, and left, himself, on the 7th of that month. On the 6th of October there was a distress for 50*l.* rent due from the plaintiff to his landlords, the Saddlers' Company. This was settled by an arrangement to take 25*l.* and the expenses. The broker who made the distress stated, that he thought at that time there was sufficient of the plaintiff's property to satisfy the rent. But he admitted that there was not enough in the month of March following, when he distrained for the rent due at Christmas.

VAUGHAN, B.—I think reasonable apprehension of having his goods distrained for rent is what every man may have, for aught I know, when he enters into apartments. I think this is no answer to the action. There is one expression which the plaintiff made use of which is equivocal, and on which the jury may act; it is, that if the defendant was afraid he might take his goods away.

Hutchinson.—But, under the statute of frauds, that not being in writing will not get rid of the written agreement.

Shee.—But it may amount to a determination of the tenancy in operation of law.

Hutchinson referred to *Mollett v. Brayne* (a), and then addressed the jury in reply, and contended that there was

(a) 2 Camp. 103. That case year to year, created by parol, is decides, "that a tenancy from not determinable by a parol license

no principle which went farther than this, that the letting in of another tenant by the landlord may amount to a determination of the tenancy.

1833.
 RICKETT
 v.
 TULLICK.

VAUGHAN, B., (in summing up).—There really is nothing in this case. The parties must abide by the written agreement, which requires a quarter's notice. The question, therefore, is, whether the circumstances proved furnish a justification of the defendant's quitting without giving any. It seems that he possessed a morbid degree of sensibility. Every man who takes apartments knows that his goods are liable for his landlord's rent; and, if his goods are taken, and he suffers injury, he may recover in law for that injury. But we are not to try the sensibility of a man's nerves. As to the supposed permission to go, it is not an answer in point of law, on account of the statute. But, considering what the final arrangement was when the key was delivered up, it does not seem to be made out in fact. The question is, whether a man, who is afraid that his goods may be distrained, is at liberty to leave. I am clearly of opinion, in point of law, that he is not. He must either be evicted, or be prevented from having beneficial occupation. His Lordship then observed upon the letters, and said that the defendant's answer was inconsistent with his present defence.

Verdict for the plaintiff—Damages 7*l.* 10*s.*

Hutchinson, for the plaintiff.

Shee, for the defendant.

[Attornies—*Spyer*, and *Heathcote*].

from the landlord to the tenant, and the tenant's quitting the premises accordingly."

1833.

Adjourned Sitting in London after Easter Term, 1833.

BEFORE MR. BARON GURNEY,

(Who sat for the Lord Chief Baron).

May 14th.

ADAMS v. OAKES.

A., the drawer of a bill, gave it to B., undorsed, to present it for payment. B. did so, and got it noted. Afterwards A. indorsed the bill, and gave it to B. to obtain payment:—*Held*, that this indorsement was sufficient to enable B. to recover in an action against the acceptor, notwithstanding A. said, upon the trial, that B. was indebted to him, and that he did not give him any authority to bring the action.

ASSUMPSIT on a bill of exchange, drawn by one Duffield on and accepted by the defendant. The bill, when produced, appeared to have Duffield's indorsement upon it. After the usual proof on the part of the plaintiff—

On the part of the defendant, Duffield was called as a witness. He stated that his wife was a laundress, and washed for the defendant, who, owing her a sum of 8*l.*, in order to pay it gave her a 29*l.* bill to get discounted. He could not accomplish it, and, at the defendant's suggestion, he drew one for a smaller amount—the bill in question—which he also in vain endeavoured to get discounted. Before it became due, he gave it, undorsed, to the plaintiff to present. He presented it, and got it noted, after which it was indorsed by him (Duffield), and given to the plaintiff to get payment. He further stated, that the plaintiff was indebted to him, and was confined in the King's Bench prison, and that he never gave him any authority to bring the action.

C. Saunders, for the defendant, contended, that, under these circumstances, no title passed to the plaintiff, so as to enable him to sue.

Erle, for the plaintiff, *contrà*, contended, that the mere indorsement was quite sufficient to constitute the plaintiff the legal holder of the bill.

GURNEY, B.—I am of opinion that the indorsement is sufficient to enable the plaintiff to maintain the action; but, as the bill was indorsed after it became due, only

what was owing from the defendant to the drawer can be recovered. If Duffield speaks truly when he says that the plaintiff was indebted to him, and not he to the plaintiff, he will be entitled to call upon him for the money, as he will hold it merely as a trustee. But, as the bill has been indorsed over, the plaintiff may recover the amount due from the defendant.

1833.

ADAMS
v.
OAKES.

Verdict for the plaintiff—Damages 6*l*.

Erle and *Thomas*, for the plaintiff.

C. Saunders, for the defendant.

[Attornies—*Abraham & R.*, and *Person*].

See *Reed v. Furnival*, ante, Vol. 5, p. 499.

Sitting in London in Trinity Term, 1833.

BEFORE MR. BARON GURNEY.

—♦—
FYSON v. KEMP.

June 10th.

ASSUMPSIT on an attorney's bill. Plea—non assumpsit, with a set-off for a balance of salary, the defendant having been clerk to the plaintiff.

A witness produced a duplicate of a bill of costs which had been delivered and signed by the plaintiff pursuant to the statute.

In an action on an attorney's bill, it is not necessary to give notice to produce the original bill delivered to the party, but the production of a duplicate thereof is sufficient.

Law, for the defendant, contended, that notice ought to have been given to the defendant to produce the identical bill which had been delivered to him, in order that the Court might see, upon its production, whether it was conformable with the directions of the statute.

Nor is it necessary that the parties examining should read the two bills alternately.

Chilton, for the plaintiff.—It has been decided that the production of the bill delivered is not necessary.

1839.
FYSON
v.
KEMP.

GURNEY, B.—I do not know of any instance in which such notice has been given. My impression is, that the practice has always been to give in evidence a duplicate without any notice. This case differs from the case of any other paper, because in the ordinary case notice is required, as the party would say that he had not the paper in court, because he had no notice that it would be wanted. But here the Act of Parliament is notice that it would be wanted, and that without proof of its delivery the plaintiff must be nonsuited. I think the duplicate is sufficient; but I will take a note of the objection.

The witness then being asked as to the correctness of the duplicate, said that he could not undertake to say that he himself saw the original bill which was delivered to the defendant; but he believed that another clerk held the original bill, and he held the duplicate produced at the time when they examined them.

Law submitted that the bills should have been examined crossways.

GURNEY, B., was of opinion that what had been done was sufficient (a).

Verdict for the plaintiff.

Chilton, for the plaintiff.

Law and *Hoggins*, for the defendant.

[Attornies—*Fyson*, and *Atkinson & Pilgrim*.]

(a) In the case of *Rolf v. Dart*, 2 Taunt. 52, it is decided, that, "to prove a copy of a record, it is sufficient to prove that the paper agrees with what the officer of the court read as the contents of the record; and it is not necessary for the persons examining to exchange papers and read them alternately." See also, to the same

effect, *M'Neill v. The Sheriffs of London*, 1 Esp. 263. ; and *Reid v. Margison*, 1 Camp. 469. In the case of *Gyles v. Hill*, Id. 471, n., *Lawrence, J.*, said: "Here the original was read by the officer of the court, but I should have ruled the same way had it been read by any other person."

1833.

*Adjourned Sittings at Westminster after Trinity Term,
1833.*

BEFORE LORD LYNTHURST, C. B.

TAIT v. HARRIS and Two Others.

TRESPASS for breaking and entering the plaintiff's house, with counts for expulsion and false imprisonment. Plea—General issue.

On the part of the plaintiff, a trespass on the house by the three defendants, and an expulsion also by all three, were proved.

Erle, for the plaintiff, then proposed to give evidence of an imprisonment of the plaintiff by one of the defendants.

LORD LYNTHURST, C. B.—You must elect either to go on the joint or the separate trespass.

Erle, for the plaintiff, proposed to abandon the trespass on the house, and to go on for the imprisonment.

Follett, for the defendant.—I submit that that cannot now be done. A plaintiff, having proved a joint trespass against three defendants, cannot abandon that and go on against one of the defendants only for another trespass. This has been often ruled by Lord *Tenterden*.

LORD LYNTHURST, C. B.—I think, Mr. *Erle*, you must go on with the joint trespass.

Verdict for the plaintiff, on the count for the expulsion, with leave to move to enter a nonsuit upon another point.

Erle, for the plaintiff.

Follett and *Harris*, for the defendants.

[Attornies—*G Williams*, and *J. Fielder*.]

June 18th.

Trespass and expulsion against three, with a count for imprisonment. The expulsion having been proved against the three defendants, the plaintiff's counsel went into evidence of the imprisonment, but that appeared to have been by one of the defendants only: —*Held*, that the plaintiff's counsel could not abandon the first trespass proved against all three, and go on with the case as to the imprisonment by the one defendant alone.

1833.

DEACON v. FULLER.

Where, on the second trial of a cause, a witness stated that he had, on the argument for the new trial, handed a document to one of the learned Judges, and had not since seen it, or been able to find it, secondary evidence was received of its contents without any search for it having been made at the chambers of the learned Judge; the presumption being that his lordship returned it to the party who produced it.

ASSUMPSIT on a guarantie. Plea—General issue.

This was a new trial, and it was stated by Mr. Wyse that he had produced the guarantie at the former trial; and that, on the argument for the new trial, Mr. Baron Hullock had asked to see the guarantie, which was handed to his lordship, and the witness had not since seen it.

Mr. Morris proved, that he had made diligent search at the chambers of the Lord Chief Baron in Serjeant's Inn, and also at the house of Sir W. Alexander, who was Lord Chief Baron at the time of the argument, but had not been able to find this paper. There was no evidence of any search at the chambers or house of Mr. Baron Hullock.

Jones, Serjt., for the plaintiff, proposed to give secondary evidence of the guarantie.

Jervis, for the defendant.—There has been no search at Mr. Baron Hullock's.

Manning, for the plaintiff.—The question is, whether any search there was necessary. A learned Judge in the ordinary course would return papers to those from whom he received them.

Jervis.—This paper, according to the evidence of Mr. Wyse, at first was in his possession, and was then handed to Mr. Baron Hullock. It is never at all shown to have been in the hands of Sir W. Alexander.

Lord LYNTHURST, C. B.—If the paper was handed up to the Judges, it must be presumed that it was handed back again to the party who produced it. That being so, the search at the Lord Chief Baron's chambers and at Sir W.

Alexander's was therefore unnecessary. I shall not stop the case upon this objection, but I will make a note of it.

1833.
DEACON
v.
FULLER.

A clerk of the plaintiff's attorney proved that he had copied the guarantie accurately in the briefs, and a copy was read in evidence from the brief of Mr. Serjt. *Jones*.

Nonsuit on the merits.

Jones, Serjt., and *Manning*, for the plaintiff.

Jervis, *R. V. Richards*, and *Mansel*, for the defendant.

[Attornies,—*Austen & H.*, and *Eldred*.]

BLOOMFIELD v. BLAKE, COHEN, SWAYSLAND, and
SOLOMON.

TROVER for a watch and a number of other articles.

It was opened on the part of the plaintiff, that the plaintiff having been arrested for a sum of 28*l.* at the suit of the defendant Cohen, the defendant Blake had become bail for her, and that some proceedings having been taken against him as bail, he had come to the plaintiff's lodgings, accompanied by the defendant Cohen, who was plaintiff in the original cause, and two other persons, named Swaysland and Solomon, whom he stated to be sheriff's officers, although they were in fact not so.

It was proved, on the part of the plaintiff, that in the month of February, 1833, the four defendants came to the lodgings of the plaintiff, and that the defendant Blake said he must have his money; and that the plaintiff said that she would pay him on her return to London. The

June 24th.

A., having been bail for D., went accompanied by B. and C. to the lodgings of D., telling her that B. and C. were officers, who would take her to gaol if she did not give him security for his debt. B. and C. were not officers, and had no authority to take D. D. gave A. a number of articles, and signed a paper stating that the articles were deposited with A. for security, and that he might sell them if he was

not paid in 42 days:—*Held*, that D. might recover the value of the articles in trover; and that as B., C., and D. acted in concert, the verdict must pass against all three, although it appeared that C. and D. never had any of the goods.

1833.
BLOOMFIELD
v.
BLAKE.

defendant Blake said he must have his money, or the plaintiff must go to Horsham gaol; and he stated that the defendants Swaysland and Solomon were officers. The plaintiff appeared frightened, and said she hoped not to be taken to gaol; when the defendant Blake asked if she had not some articles of value, and desired that they should be deposited with him. The plaintiff fetched the articles in question, which she delivered to the defendant Blake, and then the defendants Swaysland and Solomon wrote two papers, which were signed by the defendant Blake and by the plaintiff. A witness also stated that the defendants Swaysland and Solomon valued the articles at 33*l.*, which was the sum that the defendant Blake claimed; but that the defendant Cohen afterwards said that the articles were worth 70*l.* The articles were taken away by the defendant Blake.

It was further proved, by the clerk of the plaintiff's attorney, that he accompanied the plaintiff to the defendant Blake to demand the articles, and that the latter said that he had meant to arrest the plaintiff, but that by some mistake the warrant had not come down, and that he was forced to resort to stratagem; and that he was only an hour too soon. This witness also proved that the defendant Blake refused to give up the articles unless he was paid his demand.

Lord LYNDHURST, C.B.—If these witnesses are believed, the plaintiff is entitled to a verdict. These parties pretended to be armed with the authority of the law, which they were not, and they got possession of these goods by wrong.

The defendant's counsel put in the following written agreement, signed by the plaintiff and by the defendant Blake, which was one of the written papers mentioned in the evidence for the plaintiff: it was as follows—

“ Memorandum of an agreement made this 7th day of

February, 1833, between Sarah Bloomfield of the one part, and William Blake of the other part.

“Whereas the said Sarah Bloomfield stands justly indebted to the said William Blake in the sum of 33*l.* 18*s.*; and, in order to secure the payment of the same, hath this day deposited the undermentioned articles:—viz. One gold watch and gold guard-chain [*here followed a list of the articles.*] And it is agreed between the parties hereto, that the said William Blake shall be at liberty to make sale and dispose of the several articles *within* 42 days from the date hereof, unless the said Sarah Bloomfield shall in the mean time pay the sum of 33*l.* 18*s.*

(Witness) T. A. Swaysland, (Signed) Sarah Bloomfield,
Henry Solomon. William Blake.”

1833.
BLOOMFIELD
v.
BLAKE.

LORD LYNTHURST, C. B.—She entered into that agreement, believing that she would be taken to gaol if she did not.

Law, for the defendant Blake.—Does not your lordship think that this agreement varies the case?

LORD LYNTHURST, C. B.—Certainly not.

J. Williams.—With respect to the defendants Swaysland and Solomon, it appears that they never had any of the goods.

LORD LYNTHURST, C. B.—The defendants all acted in concert, and were guilty of a conspiracy, for which they might all have been indicted.

His Lordship directed a

Verdict for the plaintiff.

Bompas, Serjt., and *Carrington*, for the plaintiff.

Law, and *Platt*, for the defendant Blake.

J. Williams, for the defendants Swaysland and Solomon.

[Attornies—*Frowd*, and *R. Hill*—*J. Alexander*—*Spyer*].

1833.

Adjourned Sittings in London, after Trinity Term, 1833.

BEFORE MR. BARON GURNEY,

(Who sat for the Lord Chief Baron).

July 5th.

SMITH v. WHITTINGHAM.

A. was clerk to B. from the year 1829. In 1832, C. gave a bond for the faithful conduct of A. as such clerk. After that, B. dismissed A., and after his dismissal A. made an admission of various sums that he had not accounted for:—*Held*, that in an action on the bond this admission was not evidence against C., as A. was living at the time of the trial, and might have been called as a witness:—*Held*, also, that it appearing that one item in the admission was of a sum received by A. before the date of the bond, C. would not be liable to the amount of the admission, although it had been shewn to him, and he had said that B. must get what he could of A., and he (C.) would pay the rest.

DEBT on a bond, dated April 16th, 1832, for the good conduct of J. Fisherwick, a clerk of the plaintiff. Pleas—*first, non est factum; second, fraud; third, performance; fourth*, another plea of performance in a different form. Replication—assigning breaches by Fisherwick, in not paying over and accounting for monies received by him for the plaintiff, after the date of the bond.

It appeared that Mr. Fisherwick had been a clerk of the plaintiff since the month of June, 1829, and that in the month of April, 1832, the plaintiff required him to find security, when the defendant and three other persons agreed to become his sureties; and the present bond was in consequence executed by the defendant, and one of the other persons, but not by the two remaining ones. Fisherwick was dismissed from the plaintiff's service in the month of May, 1832.

On the part of the plaintiff three persons were called, who had paid Fisherwick, on account of the plaintiff, sums amounting to 4*l.* 9*s.* 6*d.*, since the date of the bond, which had not been accounted for; but with a view of shewing a deficit of a much greater amount, an account was offered in evidence. It was partly written by one of the plaintiff's attornies, and partly by Fisherwick, and corrected by him on the 1st of June, 1832. This account was headed—"Account of Monies received by J. Fisherwick, and embezzled by him." It contained a considerable number of names and sums, but no dates.

It was proved that one of the plaintiff's attornies shewed the account to the defendant, who told him to get what he

could from Fisherwick, and he, the defendant, would pay the rest. The plaintiff sued Fisherwick, who took the benefit of the insolvent debtors' act. It was proved that the defendant had seen Fisherwick before he took the benefit of the insolvent debtors' act, but there was no evidence of what had passed between them. It was proved that one sum specified in the account was received by Fisherwick before the execution of this bond; and it also appeared that Fisherwick was living, and might have been called as a witness.

1833.
SMITH
v.
WHITTINGHAM.

Wightman, and *Cowling*, for the defendant, objected that this account was not evidence against the defendant. It might be evidence that Fisherwick had not accounted for the sums mentioned in it, but not evidence that he had received the sums of money there specified. The cases all take the distinction whether the clerk is living or dead. Fisherwick ought to have been called. The cases of *Middleton v. Melton* (a), *Whitmash v. Genge* (b), and *Goss v. Watlington* (c), are all cases of deceased clerks. The cases of

(a) 10 Barn. & Cress. 317. In that case an entry made by a deceased collector of king's taxes in a private book, kept by him for his own convenience, whereby he charged himself with the receipts of sums of money, was held to be evidence against the surety, of the fact of the receipt of such money, in an action on a bond conditioned for the due payment of the taxes by the collector, *although the parties by whom the money had been paid were alive*, and might have been called as witnesses, and that upon the general principle that the entry was to the prejudice of the party who made it. This case goes on the fact of the entry being an entry made by a person

charging himself, *that person being since dead*.

(b) 3 M. & R. 42. This case was an action on a bond given to bankers, conditioned for the fidelity of a clerk, and it was there held, that entries of the receipt of sums of money made by the clerk in a book, kept by him in the discharge of his duty as clerk, are *after his death* evidence against his sureties of the fact of the receipt of the money.

(c) 6 Moore, 355. In that case, which was an action of debt on bond against the surety of a deceased beadle of a ward, the bond being conditioned for the due performance of his duty in collecting the watch rates and other rates,

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Cutler v. Newlin (d), and *Evans v. Beattie* (e), are much nearer in point.

Bompas, Serjt., and *Ball*, *contrà*, submitted, that, since the defendant had bound himself for the good conduct of Fisherwick, he had so identified himself with him, that any account rendered that was receivable in evidence against Fisherwick would be equally so against the defendant.

GURNEY, B.—This is not an account current, it is only an admission made by Fisherwick after his discharge of what he had embezzled; and though it would have been evidence against Fisherwick, it is not so against the defendant. As to the supposed admission of the defendant when

&c., and for delivering to the obligee all books and accounts intrusted to his care, and a collecting book received by him from his predecessors, for the faithful delivery of which to the obligee the defendant became surety, and on the death of the principal it was accordingly delivered to such obligee, containing the names of the parishioners, and the sums at which they were rated, and the usual mark was made by him opposite to some of such names by which he indicated the receipt of the sums assessed on them, and receipts signed by him for money paid to him in his official capacity were produced, and received in evidence against the surety. On the execution of a writ of inquiry, it was held, by the Court, on a motion whether they ought to have been admitted, that the entries in such book were properly received in evidence, as it might be deemed a public book, but that the circum-

stances of the case did not warrant either an actual or implied authority by the surety, so as to admit the receipts of the principal as evidence against him.

(d) *Mann Dig. N.P.C. tit. "Evidence,"* 137. This case was tried before Mr. Justice Holroyd, at the Winchester Spring Assizes, 1819. It was there considered that on the execution of an inquiry under 8 & 9 Will. 3, c. 2, on an indemnity bond, the admission of the principal of the amount of the damnification was inadmissible, and the amount was proved aliunde.

(e) 5 Esp. 26. This was an action on a guarantie to pay for goods sold and delivered to a third person; and it was there held, that what such third person has said respecting the goods sold to him, is not evidence to charge the person giving the guarantie, and that the delivery of the goods must be proved.

he saw the account, it is clear that the account cannot be relied on as a correct statement of what was received after the date of the bond, as it is in proof that one sum mentioned in it was received before; and that being so, an express promise to pay the sums mentioned in the account would be inoperative, unless the sums received after the date of the bond could be distinguished from those received before.

1833.
SMITH
v.
WHITTINGHAM.

Verdict for the plaintiff—Damages 4*l.* 9*s.* 6*d.*
with leave for the plaintiff's counsel to
move to increase the amount of the ver-
dict (*a*).

Bompas, Serjt., and *Ball*, for the plaintiff.

Wightman, and *Cowling*, for the defendant.

[Attornies—*Towne*, and *Adlington & Co.*]

(*a*) No motion was made.

OLD BAILEY JULY SESSION, 1833.

BEFORE MR. JUSTICE GASELEE, MR. JUSTICE J. PARKE, AND
MR. RECORDER LAW.

REX v. FURSEY.

July 4th.

INDICTMENT on the stat. 9 Geo. 4, c. 31, s. 12.—
The first count charged that the prisoner did stab and

A riot is not the
less a riot, nor
is an illegal
meeting the less
an illegal meet-

ing, because the proclamation from the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a capital offence if they do not disperse within an hour; but, if that proclamation be not read, the parties are guilty of the common law offence, which is a misdemeanor, and all magistrates, constables, and even private individuals, are justified in dispersing the offenders; and, if they cannot otherwise succeed in doing so, they may use force. Without any proclamation at all, if a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence.

A meeting called "to adopt preparatory measures for holding a national convention," is an illegal meeting.

A. was indicted for stabbing B., there being another indictment against him for stabbing C.:—
Held, that, on the trial of the indictment for stabbing B., both C. and the surgeon might be asked as to what kind of wound C. received, with a view of identifying the instrument used.

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wound John Brooke, with intent to disable him. The second count charged the stabbing and wounding of John Brooke, to be with intent to do him some grievous bodily harm. The third count charged that the prisoner did stab and wound John Brooke, he, the said John Brooke, being a constable duly appointed and sworn to act as a constable, under and by virtue of an act of parliament, passed in 10 Geo. 4, (The Metropolitan Police Act), with intent to resist and prevent the lawful apprehension and detainer of him, the said George Fursey, for an offence for which he was liable to be apprehended and detained; that is to say, for that he, together with divers other persons, to wit, five hundred other persons, to the jurors unknown, were tumultuously assembled, making a great tumult, riot, and affray, in the view of the said John Brooke, then and there being such constable as aforesaid.

The fourth count was similar to the third, except that it omitted to state that John Brooke was a constable, and that the riot, &c., was committed in his view.

The fifth count charged that the prisoner stabbed and wounded John Brooke, with intent to resist and prevent the lawful apprehension and detainer of the said George Fursey, for an offence for which he was then and there liable to be apprehended and detained.

The prosecutor, Brooke, was a sergeant of the Metropolitan police force: and, on the 13th of May, 1833, was with a very considerable number of the police at a vacant space of ground adjacent to the west side of the Cold Bath Fields Prison. It appeared that there was a meeting there, consisting of a number of persons, and that there were four flags. The prisoner carried an American flag, which a police constable, named Redwood, tried to take from him, when he stabbed both the prosecutor and Redwood with a sort of dagger with a triangular blade, similar to that of a court sword. It appeared, from the cross-examination of the witnesses for the prosecution, that many of the police constables were at the place in question in plain clothes.

The counsel for the prosecution asked Redwood whether he had been wounded, and, having done so, proposed to ask what sort of a wound it was that he received.

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REX
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FURSEY.

C. Phillips, for the prisoner.—I must object to any evidence being given of a wound that this witness received, as that is the subject of another indictment. In the case of *Rex v. Smith (a)*, the uttering of a second forged note was not allowed to be given in evidence, as it was the subject of a distinct indictment.

PARKE, J.—It is offered as evidence to identify the instrument.

GASELEE, J., (having conferred with Mr. Justice J. PARKE).—My brother PARKE and myself agree that it is evidence, so far as to identify the instrument; and we think that this is quite different from the case cited.

PARKE, J.—The evidence is merely given to identify the instrument.

The witness stated that the wound he received was of a triangular shape.

The dagger was produced; it was found in the place to which the prisoner was taken, as soon as he was apprehended.

Mr. Fisher, the superintendent surgeon to the Metropolitan police, stated, that the wound received by the prosecutor was of a triangular shape.

The counsel for the prosecution proposed to ask him as to the shape of the wound inflicted upon the witness Redwood.

C. Phillips objected.

(a) Ante, Vol. 2, p. 633.

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FURSEY.

PARKE, J.—We decided this in effect just now.

Mr. Fisher stated, that both the wounds were triangular, and might have been inflicted by the instrument produced.

For the defence, it was stated by Mr. Stallwood, who had been a magistrate for the county of Middlesex, that a considerable number of the police constables behaved with considerable violence, striking every body they met with. He also stated, that there was no order given to the people to disperse, nor was the proclamation from the Riot]Act read. In answer to questions put by *Campbell*, S. G., Mr. Stallwood stated that he saw a paper fixed up to the wall of Cold Bath Fields, cautioning persons not to attend an illegal meeting.

Campbell, S. G., was proceeding to examine into the contents of this caution.

C. Phillips.—As this was a printed paper the manuscript from which it was printed ought to be produced.

Campbell, S. G.—We cannot bring the wall of Cold Bath Fields here; and there is no proof that there ever was any manuscript.

C. Phillips.—The best evidence would be the original. It is suggested that this paper was published by the government, and that this is a government prosecution. If so, there can be no difficulty about it.

GASELEE, J.—In Mr. *Hunt's* case (a), parol evidence was given of the inscriptions on the banners.

(a) 3 B. & A. 566. In that case it was held, that parol evidence of inscriptions and devices on banners and flags, displayed at a meeting, is admissible, without producing the originals.

Campbell, S. G.—This was affixed to a wall.

PARKE, J.—The usual way in such cases is to give a copy to the witness, and ask if it is a copy of what he saw. I do not say that parol evidence is inadmissible. The paper was affixed to a wall.

Campbell, S. G.—If my friends wish to have a copy put in, I will do so.

A printed copy of the paper was handed to the witness. It was to the following effect:

“Whereas printed papers have been posted up and distributed in various parts of the metropolis, advertizing that a public meeting will be held in Coldbath Fields on Monday next, May 13th, to adopt preparatory measures for holding a national convention, as the only means of obtaining and securing the rights of the people; and whereas a public meeting holden for such a purpose is dangerous to the public peace and illegal, all classes of his Majesty’s subjects are hereby warned not to attend any such meeting, nor to take any part in the proceedings thereof; and notice is hereby given, that the civil authorities have strict orders to maintain and secure the public peace, and to apprehend any persons offending herein, that they may be dealt with according to law.

“*By Order of the Secretary of State.*”

It was further stated by Mr. Stallwood, that he did not consider this a proclamation, because it was not signed, and that therefore it was to be disregarded, and that he had never seen a proclamation published by the government without the name of some Secretary of State to it, or its being headed, “By the King in Council.” This witness further stated, that he heard the chairman of the meeting say, that he (the chairman) was much obliged to the Whig government for advertizing their meeting, for it gave them an importance they did not possess.

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It was proved by other witnesses, that some of the police constables behaved with great violence ; though none of them spoke to any violence used by the prosecutor or Redwood ; and it was stated by one of the witnesses for the defence, Mr. Courtney, on his cross-examination, that he saw a death's head and cross bones on one of the flags, and the inscription—" Liberty or Death:" and it was also proved on the cross-examination of another of the witnesses for the defence, Mr. Carpenter, that he knew of the intended meeting before he went to the ground, as he had seen it stated to be the intention of the meeting to establish a national convention ; that he had seen it stated in various publications, advertisements, and bills ; and he further stated that it was notorious.

GASELEE, J., (in summing up.)—The question for you to consider will be, whether there was sufficient provocation to reduce the offence of the prisoner below the crime of murder, if death had ensued ; and although it is not mentioned in the indictment, you are at liberty to inquire whether the meeting was an illegal meeting or not ; for if it was, the police would be justified in taking away the flag ; but if the meeting was not an illegal one, then they would have no right to take the flag away from the prisoner. Taking it that the meeting was a legal one, this question will arise, whether the taking away of the flag was a sufficient provocation to justify the prisoner in striking with such a deadly weapon ; and it makes a great difference whether a man under provocation takes up a deadly weapon on the sudden, or whether he goes out with the weapon, intending to use it to prevent the taking away of the flag. It will be for you to say whether the conduct of the prisoner shewed that malignity of purpose which would, if death had ensued, have constituted the crime of murder. If you are of opinion, that he took this deadly weapon with an intention to resist, under all circumstances, the taking away of the flag, I feel justified in telling you, and

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I believe that my learned brother will agree with me, that, if death had ensued, the crime of the prisoner would not have been less than the crime of murder; however, you ought also to consider, whether there was sufficient provocation before the blow was given, to reduce the offence, had death ensued, to the crime of manslaughter. A great deal has been said of the impropriety of sending out policemen in plain clothes. I own that it does not strike me that there is any impropriety in it; for those who have to prevent disturbances, would not do their duty, if they did not take every means of discovering the persons who were concerned in them. For, although it would be improper, as suggested on the part of the prisoner, if persons were sent out to lead others into the commission of offences; yet when the object is to prevent the commission of crime, parties would not do their duty, if they did not take every means of finding out the parties concerned, by sending those in among them who might be able to make the discovery.

On the part of the prisoner a great deal of evidence has been given to shew that the conduct of the policemen was very violent and very outrageous. You will have, therefore, to consider whether their conduct was a sufficient provocation to the prisoner to resist as he did, or whether, from the fact of his having taken the weapon out with him, there was that malignity of purpose which would have made the offence of the prisoner amount to murder, if death had ensued.

It appears, from the evidence of Mr. Stallwood, that the proclamation contained in the Riot Act was not read. Now, a riot is not the less a riot, nor an illegal meeting the less an illegal meeting, because the proclamation of the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a capital offence if they do not disperse within an hour; but, if that proclamation be not read, the common law offence remains, and it is a

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misdemeanor; and all magistrates, constables, and even private individuals, are justified in dispersing the offenders; and, if they cannot otherwise succeed in doing so, they may use force. I do not lay down this as the law, for the first time; the law has been so laid down by the Judges on the special commissions. There has also been given in evidence a proclamation issued by order of one of the Secretaries of State; and in that proclamation it is stated that printed papers have been posted up, advertizing that a public meeting would be held to adopt preparatory measures for holding a national convention. Now, that proclamation is not evidence that the meeting was to be held for the purposes there mentioned. It is, in effect, only a notice given by the Secretary of State, and is evidence in this case in no other way; but, if placards convening the meeting were posted up, stating that the meeting was for those purposes, then it is an illegal meeting. If it was intended by force to make any alterations in the laws of the country, that would be a much more serious offence, as it would be high treason. The proclamation states it to be an illegal meeting, and commands all constables and others to disperse it. If such a notice be given, and a party chooses to treat it as of no effect, he does it at his own risk.

Clarkson, for the prisoner.—The Solicitor-General did not offer any evidence to shew that this proclamation was issued by the Secretary of State.

GASELEE, J.—That is true; but, without any proclamation at all, if a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence. There may be a difficulty in saying in what way this meeting was illegal, but it was either illegal as a misdemeanor or a higher offence; and, whichever it was, it justifies the dispersion of the meeting. One of the witnesses has stated that the purpose of the meeting was to adopt preparatory

measures for holding a national convention, and that that was generally known. If you think that the meeting was held for the purpose of adopting preparatory measures for the holding of a national convention, then the police had a right to interfere, and arrest the parties. The first question will be, whether the prisoner was the person who gave the wound to the prosecutor Brooke? and the question will then be, whether there was such provocation as would have reduced the offence to the crime of manslaughter, if death had ensued? If you are of opinion that the prisoner, having taken the flag in his hand, had prepared the weapon with a view of protecting it under all circumstances, then I own it appears to me, that there are not those circumstances which will reduce the crime, so as that, if this person Brooke had died, it would not have amounted to murder. If you think that the prisoner, previous to his going out, prepared a deadly weapon to resist any attempt to defeat the object of the meeting, or to prevent himself from being deprived of the flag which he carried, I am bound to tell you that I think the offence has been proved.

Verdict—Not guilty.

Campbell, S. G., Adolphus, Wightman, and R. Gurney,
for the prosecution.

C. Phillips, and Clarkson, for the prisoner.

[Attornies—*Maule & B., and Harmer & Co.*]

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MIDDLESEX SPECIAL COMMISSION.

CLERKENWELL SESSIONS HOUSE,

BEFORE MR. JUSTICE J. PARKE, MR. RECORDER LAW, MR.
SERJEANT ARABIN, FRANCIS CONST, ESQ., AND
OTHER COMMISSIONERS (a).

August 8th.

A party cannot be legally convicted upon an indictment found by the Grand Jury upon the testimony of witnesses, who were sworn by an officer of the Court after the session had lapsed, in consequence of its having on two successive days been opened and adjourned without the presence of any Justices.

THE Commission was read. It was in substance as follows: "Whereas we have been given to understand and be informed, that A. B., C. D., &c., naming certain persons, stand committed to the custody of the keeper of our gaol of Newgate, charged with the commission of divers offences; and whereas it is expedient that they should be tried for the said offences, &c., we have, therefore, assigned, &c., &c., &c."

Mr. Justice J. PARKE, in his charge to the Grand Jury (*inter alia*) said:—"You are assembled in consequence of a commission, directed to myself and others, empowering us to try certain offenders. This is an extraordinary proceeding. You are aware that it arose from an irregularity in the mode of swearing the witnesses who were to give evidence before the Grand Jury, which irregularity would prevent those persons from being indicted for perjury. This, in the opinion of the Judges, prevented the prisoners from being legally convicted; and, therefore, this commission has been appointed. Some were tried and acquitted: these are not included. They may

(a) The Bar appeared in Court in their wigs and gowns. It was at first doubted whether they ought so to appear, as the practice on the circuits is for the Bar to be absent while the charge is given to the Grand Jury. But it ap-

peared, that, on the Special Commission at Bristol, before Tindal, C. J., the Bar, headed by the Attorney-General, were present in Court to hear the charge, the resolution was adopted of pursuing a similar course.

be considered as for ever quit of the charges against them. Some were convicted of trifling offences: they have been discharged. Some were not tried at all; and some were tried and convicted of serious offences. Both these latter descriptions will come before you."

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The Grand Jury then proceeded to find bills against the prisoners; several of the Commissioners remaining in Court all day for the purpose of having the witnesses sworn before them.

On the following day the Commissioners sat at the Sessions House in the Old Bailey, for the trial of those against whom bills had been found.

N.B.—The irregularity alluded to by the learned Judge in his charge to the Grand Jury was as follows. The Session met regularly on the Monday and was regularly adjourned to the Tuesday. The Court was not legally opened or adjourned on the Tuesday or Wednesday (*a*), and did not meet for business till the Thursday; but the witnesses were notwithstanding sworn on the Tuesday and Wednesday, to give evidence before the Grand Jury, by the crier of the Court, in the usual form. Two magistrates attended on the Wednesday and received the bills from the Grand Jury.

(*a*) We understand that the crier of the Court pronounced the opening and adjournment in the usual form on the Tuesday morning and afternoon, and also on the Wednesday; but *at the time* when he did it *none of the justices were present*, though they were in the course of the morning. The magistrates, on being inform-

ed of this fact, at first came to a resolution that the adjournments had taken place according to the custom which had been adopted during the memory of the oldest officer of the court; but, on a subsequent day they resolved, that the session, for want of a regular adjournment, had lapsed on the Tuesday.

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OLD BAILEY (a).

BEFORE MR. JUSTICE LITLEDALE, MR. BARON VAUGHAN,
AND OTHER COMMISSIONERS.

August 8th.

REX v. WILLIAM BITTON.

The statute 7 & 8 Geo. 4, c. 28, s. 2, authorizing the Court to direct a plea of not guilty to be entered for a party who stands mute of malice, or will not answer directly to an indictment, applies to the case of a party who refuses to plead, on the ground that he has previously pleaded to another indictment for the same offence, but which indictment was not valid in consequence of its having been found upon the testimony of witnesses not duly sworn to give evidence before the Grand Jury.

THE prisoner was called upon to plead to an indictment charging him with breaking into a dwelling-house, and stealing therein a brass cock. In reply to the question—"Are you guilty or not guilty?" he said, "I have pleaded to that indictment once, and I refuse to plead again."

LITLEDALE, J., observed, that the former indictment and trial went for nothing, as the Court had no jurisdiction. The proceeding was informal, and, therefore, a nullity.

The prisoner persisted in refusing to plead. Upon which

VAUGHAN, B., told him, that he stood in the same situation as if he had never been tried.

The Clerk of Arraignment again asked the prisoner if he was "Guilty or not guilty?"

Prisoner—"I will not plead. I have pleaded once before, and I have stood my trial."

Bodkin, for the prosecution, requested that the Court would direct a plea of not guilty to be entered for the prisoner, according to the statute 7 & 8 Geo. 4, c. 28, s. 2 (b).

(a) The Special Commission adjourned to the Old Bailey for the trial of the prisoners. "that if any person, being arraigned upon or charged with any indictment or information for treason, felony, piracy, or misde-

(b) By this section it is enacted,

The prisoner was again required to plead, but still refusing—

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The Court directed a plea of not guilty to be entered for him.

meanor, shall *stand mute of malice, or will not answer directly* to the indictment or information, in every such case it shall be lawful for the Court, *if it shall so think fit*, to order the proper officer to enter a plea

of not guilty on behalf of such person, and the plea so entered shall have the same force and effect as if such person had actually pleaded the same."



REX v. EDWARD CHAMBERLAIN and ANN HILL.

THE indictment charged the prisoners with feloniously having in their possession two moulds, upon which were made and impressed the figures and apparent resemblances of the obverse and reverse sides of the King's current silver coin, called a shilling.

The Court will not reject a plea of *autre fois convict*, on account of the informal manner in which it is handed in by the prisoner, but will assign counsel to put it into a formal shape, and postpone the trial, to give time for its preparation.

On being called upon to plead, the prisoner Chamberlain handed in a paper, of which the following is a copy:—

"Middlesex.

"The King on the prosecution of Mr. Field
against
Edward Chamberlain.

"My Lord,

"I plead a former conviction for the same offence this indictment charges me with, which was preferred by the present prosecutor; and I was found guilty on the 6th day of July last; and therefore I must protest, with all due submission, against being tried a second time for the same offence.

"August, 1833.

Edward Chamberlain."

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as to whether it is a nullity (a). The common course is to quash a first indictment when a second has been found.

LITLEDALE, J.—If we were to quash the first indictment, we should admit the validity of the finding of it.

(a) It seems to have been assumed, in all the foregoing cases, that the witnesses, on whose testimony the Grand Jury found the former bills, had not been properly sworn.

OLD BAILEY, SEPTEMBER SESSION, 1833.

BEFORE MR. JUSTICE PATTESON, MR. BARON GURNEY, AND
MR. RECORDER LAW.

September 9th. REX v. MULLANEY and REDDY, indicted with STONOR and Others.

MURDER.

The justices of Middlesex, in addition to the four quarter and four general sessions which they had been previously in the habit of holding, appointed other original intermediate sessions:—*Held*, that they had a right so to do; and that an indictment found at one of such additional sessions was valid in point of law.

Bodkin had, on a previous day in this session, objected to the trial of these prisoners, on the ground that the indictment had been found at a session which was not valid in point of law (a).

The Court took time to consider, and said they would consult such of the other Judges as were not absent on circuit.

PATTESON, J., now gave judgment as follows.—The indictment in this case was found by a Grand Jury of the county of Middlesex, at the Session of the Peace holden at Clerkenwell, on the 5th of August last. It appears that in the county of Middlesex, for many years, it has

(a) The principal points in the argument will be found introduced in the judgment of the Court.

been the practice to hold eight sessions of the peace; four of them are held at the usual quarterly times, and are called General Quarter Sessions, and the others at periods between those times. The session at which this indictment was found was not one of these eight, but an original session holden as such, and not by adjournment. The counsel for the prisoners argued, that the session so holden was not valid. We took time to consider, not because we ourselves entertained any doubt upon the subject, but because it was said there were differences of opinion on this matter, and because we were willing to have the assistance of some of the other Judges. We have had the opportunity of consulting my Lord Chief Justice Tindal, and Mr. Baron Bayley, who have given us their advice and opinion, and they agree with us in saying that the session at which this indictment was found was a perfectly good and valid session in point of law. The King has power to issue commissions requiring the justices to hold sessions for the trial of offences; and, if he does so, they may meet for the purpose at as many different times as they think proper. Now the words of the commission of the peace are precisely of this description:—"We command you, and every of you, that, to keeping the peace, ordinances, statutes, and all and singular other the premises, you diligently apply yourselves; and that *at certain days and places, which you or any such two or more of you as is aforesaid shall appoint* for these purposes, into the premises ye make inquiries, and all and singular the premises hear and determine." The words are as general as they can be; there is no restriction at all as to the days or number of sessions. The justices therefore have power to originate as many sessions as they please, unless they are restricted by some act of parliament. It is said that they are so restricted; but, upon a review of the statutes, we think that the contrary will most clearly appear. The first act is that of the 25 Edw. 3, st. 1, c. 7. It was not mentioned in the argument.

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It is perhaps not the most material, and has been partially repealed. The material words in it are, that the justices shall hold their sessions in all the counties of England, "at the least four times a year, that is to say," &c., and also "at all times when need shall be, according to the discretion of the said justices." It seems impossible to conceive any words stronger, or more general. The next statute is the 36 Edw. 3, c. 12. It does not state, by way of enactment, any times at which the sessions shall be holden; but it says, that it shall be stated in the commissions that "they shall be holden four times by the year," &c. Then comes the 12 Ric. 2, c. 10, to the same effect, having the words "at the least." Then comes the 2 Hen. 5, st. 1, c. 4. That statute contains the words upon which the question has been raised, viz., that the justices shall "make their sessions four times in the year, (that is to say), in the first week after the feast of St. Michael, and in the first week after the feast of the Epiphany; and in the first week after the clause of Easter, and in the first week after the translation of St. Thomas the Martyr; and more often if need be." It would seem impossible to doubt the meaning of this act of parliament, which was clearly passed to compel justices to hold their sessions at least four times in the year. Then comes the act, 14 Hen. 6, c. 4. By that act the justices of Middlesex were relieved from *the necessity* of holding sessions four times in the year, but were left *at liberty* to hold them *oftener*. It recites that inconveniences arose in Middlesex from the necessity of holding four sessions in the year; and enacts, that the justices shall be discharged from the penalty for not holding four sessions, the Court of King's Bench being sitting in that county, provided that they shall hold sessions twice in the year at the least, and oftener if need be, for any riot or forcible entry done within the county, "to the end and intent that the commons and inhabitants of the said county of Middlesex be not enforced nor compelled to appear before the justices of peace of the said county for the time being, except at

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such time as shall seem by the discretions of the said justices of peace necessary and needful,"—making it quite clear according to this act of parliament in Middlesex. The justices have in fact appointed eight sessions, and it is not pretended that they had not this right. It is said, however, that there are acts of parliament which recognize them; but there are none which directly authorize them; and the truth is, they were legally appointed at first. There is a case (not referred to in the argument) of *Busfield v. Watson (a)*, which I merely refer to, because the question did there come before the Court. It was an action for a malicious prosecution, and it was objected that the indictment was found at a session which was not a quarter session; and the Court said that the word "quarter" was immaterial, and recognized the power to hold sessions oftener. The case of *Rex v. Polstead (b)* was cited by the counsel for the prisoners in the present case, to shew that the sessions have not the power in question. That case, which is very short, is as follows:—"Appeal was made to the quarter sessions in Suffolk, 7th April, 1746, against an order of removal. The sessions was adjourned to the 9th April, at Woodbridge, where, for want of a sufficient number of justices, nothing could be done. The 11th of April a sessions is held at Ipswich, and adjourned to the 14th, at Bury, when the appeal was allowed. It was moved to quash the order of sessions, as made without jurisdiction, the sessions ending for want of an adjournment at Woodbridge; and of that opinion was the Court; for the words in 2 Hen. 5, c. 4, *and more often, if need be*, were never considered as giving more than one original sessions in a quarter, but only empowering adjournments. The country must take notice of adjournments, but was not supposed to expect a new sessions till the usual time. The order of sessions was quashed."

It must be observed, that this was an appeal which

(a) 2 W. Black. 1051.

(b) 2 Strange, 1263.

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could not be heard at any other than a good quarter sessions: there could be no doubt about that. The words relied on in this argument are, "and of that opinion was the Court; for the words in 2 Hen. 5, c. 4, and more often, if need be, were never intended as giving more than one original sessions in a quarter, but only empowering adjournments." Now, for the decision of that case, all that was necessary was to decide that the order of sessions was made without jurisdiction, as the sessions were at an end for want of an adjournment. All the rest was extrajudicial. It is probable that it was presented to the Court in this way, viz., that although the session was not properly adjourned, yet they might consider it as a new session. No, say the Court, it may be a good general but not a good quarter session. Now, if such was the decision, we do not find any fault with it. The opinion of Dr. Burn is to this effect (*a*), which I do not cite exactly as an authority; but that is his opinion. We cannot agree with the Court, if the words relied on were applied to the holding of the general session. If they were, they were quite unnecessary, and we cannot agree with them. My own opinion is as I before stated. The distinction between the two sorts of sessions, general and quarter, is plainly pointed out in Hawkins's Pleas of the Crown (*b*). It is there said—"Mr. Lambard seems to make no distinction between general, special, and quarter sessions; but it seems the better opinion that the quarter sessions are a species only of general sessions, and that such sessions are properly called General Quarter Sessions, which are holden in the four quarters of the year, in pursuance of the statute 2 Hen. 5, c. 4." This last part, however, is erroneous. I should say, not held by statute, but authorized by the King's commission. Reference has been made to an opinion of Sir Samuel Shepherd, the present Lord Chief Baron of Scotland, and the late Lord Chief Justice

(*a*) Burn's Justice, tit. "Sessions."

(*b*) 2 Curw. Hawk. c. 8, p. 65

Gibbs, when they were at the bar, upon this subject. Having great respect for the opinion of those gentlemen, I am happy to find that they express a very strong opinion in favour of the right; but recommend, for reasons many of which are not applicable to the county of Middlesex, that the magistrates, whom they were advising, should hold their session by adjournment. In fact, the practice in Middlesex as to discharging prisoners would render it inconvenient to hold sessions by adjournment, because, the Grand Jury being adjourned, parties in custody here, against whom no bills had been found, could not be discharged as they are when the grand jury are discharged. We therefore think it right to proceed with the trial of the prisoners, without reserving any question for further consideration, lest we should be supposed to throw any doubt at all upon the matter.

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IN this case the prisoner had been indicted and tried at the Clerkenwell session, after that session had lapsed (a). The session lapsed on Tuesday. The prisoner was tried on the following Friday, and sentenced to seven years' transportation. He was removed, according to the usual course, to Newgate, under an order of the Court at Clerkenwell, in pursuance of his sentence. He was brought up for trial a second time at the Old Bailey, when he produced an affidavit stating his former trial, conviction, and sentence, and that he was desirous of pleading *autrefois convict*. The Court adjourned the case, to give time for an application for a copy of the record. The case being now called on—

A plea of *autrefois convict* can only be proved by the record; and the indictment, with the finding of the jury, &c., indorsed by the proper officer, is not sufficient, although it appears that no record has been made up. But the Court, before whom the prisoner is brought to be tried the second time, will postpone the trial at the request of the prisoner, on making up of the

affidavit of the fact, to give time for an application for a mandamus to compel the record.

(a) See *ante*, p. 91.

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Bodkin, for the prisoner, stated, that the deputy clerk of the peace for Middlesex had been subpoenaed by the prisoner, and was in Court with evidence to shew that the prisoner had been previously convicted.

THE JUDGES inquired if he was prepared to produce the record of the conviction.

Bodkin replied, that he was not. All that they could produce was the indictment, with the finding of the jury marked upon the back of it; and he submitted that this was sufficient evidence, as it was not the fault of the prisoner that there was not any record. He stated further, that inquiry had been made at the clerk of the peace's office, and the party inquiring was told, that, as the session had lapsed, no record was made up which was applicable to the case of the prisoner.

THE COURT said—The case must be adjourned till the next session: we have no power to adjourn beyond that time. The object is to make application to the Court of King's Bench for a mandamus, requiring the justices of Middlesex to make up a perfect record. The witnesses need not attend till they have further notice.

Several other prisoners were then called up, who wished to rely upon their former convictions; and they were told that they should have time given them to produce a proper record of it.

These cases were further adjourned, at several subsequent sessions, to await the decision of the Court of King's Bench, the rules for the writs of mandamus not having been argued. Thus matters remained till Hilary Term, 1834, when the Court of King's Bench, after cause shewn by Sir *J. Scarlett* and *Barstow*, for the magistrates, made the rule absolute, in *Bowman's* case, for a mandamus to compel the magistrates to make up a record of the proceedings against him.

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OLD BAILEY NOVEMBER SESSION, 1833.

BEFORE MR. JUSTICE LITTLEDALE, MR. BARON BOLLAND,
AND MR. RECORDER LAW.

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REX v. EDWARD MURPHY.

MURDER.—The indictment charged the murder of Edward Thompson to have been committed by Michael Murphy at Friern Barnet, and that the prisoner and others were present aiding and abetting.

It appeared that there was a fight between Michael Murphy and the deceased, at which a great number of persons were assembled; and that in the course of the fight the ring was broken in several times by the persons assembled, who had sticks, which they used with great violence. It appeared that the deceased died in consequence of blows he received on this occasion, and the witnesses for the prosecution spoke to the prisoner's having acted as one of the seconds in the fight; but it was proved that he had not any stick.

For the defence several witnesses were called, who proved, that though the prisoner was present during the fight, yet that he did not act as second; and that he did nothing, and did not even say any thing.

LITTLEDALE, J. (in summing up).—If the prisoner was at this fight, encouraging it by his presence, he is guilty of manslaughter, although he took no active part in it.

Clarkson, for the prisoner, drew his lordship's attention to the evidence for the defence.

LITTLEDALE, J.—My attention has been called to the evidence of those witnesses who have said that the prisoner

Nov. 29th.

All persons who by their presence encourage a fight from which death ensues to one of the combatants are guilty of manslaughter, although they neither say nor do any thing. But if the death be caused not by blows given in the fight itself, but by other parties breaking the ring, and striking the deceased with bludgeons, the persons who merely encouraged the fight by their presence are not answerable.

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did nothing; but I am of opinion that persons who are at a fight, in consequence of which death ensues, are all guilty of manslaughter, if they encouraged it by their presence; I mean, if they remained present during the fight. I say, that if they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do any thing. This is my opinion of the law of this case. However, you ought to consider whether the deceased came by his death in consequence of blows he received in the fight itself; for, if he came by his death by any means not connected with the fight itself—that is, if his death was caused by the mob coming in with bludgeons, and taking the matter as it were out of the hands of the combatants, then persons merely present encouraging the fight would not be answerable, unless they are connected in some way with that particular violence. If the death occurred from the fight itself, all persons encouraging it by their presence are guilty of manslaughter; but if the death ensued from violence unconnected with the fight itself, that is, by blows given not by the other combatant in the course of the fight, but by persons breaking in the ring and striking with their sticks, those who were merely present are not, by being present, guilty of manslaughter; then, as there is no proof that the prisoner had any thing to do with this latter violence, he ought to be acquitted. The case is, at most, one of manslaughter only, and the charge of murder is not at all supported.

Verdict—Guilty of manslaughter.

R. N. Cresswell, for the prosecution.

C. Phillips, and *Clarkson*, for the prisoner.

See the case of *Rex v. Billingham*, ante, Vol. 2, p. 234.

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REX v. HARRIE.

Nov. 29th.

THE prisoner was charged with having sent a threatening letter to Mr. Ford Hale.

If a party be indicted for sending a threatening letter, the Court will, on motion of the prisoner's counsel, as soon as the bill is found, order that the letter be deposited with the officer of the Court, that the prisoner's witnesses may inspect it.

As soon as the bill was returned by the grand jury a true bill,

Clarkson, for the prisoner, asked that the letter, which was the subject of the indictment, should be shewn to the prisoner's witnesses before the trial, as it was intended to call witnesses to prove, that, in their belief, the letter was not in the handwriting of the prisoner. He therefore applied that the letter should be deposited with the clerk of the arraigns, that the prisoner's witnesses might see it.

BOLLAND, B.—There can be no objection to leaving the letter with the officer of the Court, for the purpose of the prisoner's witnesses inspecting it.

In a short time afterwards the letter was given by Mr. Flower, one of the solicitors for the prosecution, to Mr. Straight, the clerk of arraigns, for the purpose above mentioned.

Bodkin, for the prosecution.

Clarkson, for the prisoner.

[Attornies—*Flower & H.*, and *Hobler*.]

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BEFORE MR. JUSTICE LITLEDALE, MR. BARON BOLLAND,
AND MR. JUSTICE BOSANQUET.

Dec. 2nd.

—♦—
 REX v. JOHN MINTER HART.

A., in consequence of seeing an advertisement, applied to B. to raise money for him. B. said he would procure him 5000*l.*, and produced from his pocket-book ten blank 6*s.* bill stamps, across each of which A. wrote "accepted, payable at Messrs. P. & Co., 189, Fleet Street, London," and signed his name. B., who was present, took up the stamps, and nothing was said as to what was to be done with them. Afterwards, bills of exchange for 500*l.* each were drawn on these stamps, and B. put them into circulation:—
Held, that these stamps, with the acceptances thus written upon them, were neither "bills of exchange," "orders for the payment of money," nor "securities for money;" and *held*, also, that a charge of larceny against B. for stealing the stamps, and for stealing the paper on which the stamps were, could not be sustained, as this was no larceny.

LARCENY. The indictment charged the prisoner as principal, and John Kinnear (who was not in custody), and Henry Palmer (who had been previously tried on this indictment and convicted, and sentenced to transportation), as receivers. The *first count* of the indictment charged the prisoner with stealing, on the 2nd day of August, 4 Will. 4, "ten bills of exchange for the payment of 500*l.* each, of the value of 500*l.* each, the property of Francis Dugdale Astley, Esq." The *second count* charged the prisoner with stealing "ten orders for the payment of 500*l.* each, of the value of 500*l.* each, and ten other orders for the payment of money, and of the value of 500*l.* each." The *third count* charged the prisoner with stealing ten securities for the payment of 500*l.* each, of the value of 500*l.* each, and ten other securities for the payment of money of the value of 500*l.* each. The *fourth count* charged the prisoner with stealing "ten pieces of paper, each being respectively stamped with a stamp of six shillings, and of the value of six shillings, being the stamp directed by the statute, in such case made and provided, on every bill of exchange for payment to the bearer, or to order, on demand, or otherwise, not exceeding two months after date, or sixty days after sight, of any sum of money, not exceeding 500*l.*; and ten other pieces of paper with the words following written thereon: that is to say; 'Accepted, F. Dugdale Astley, payable at Messrs. Praed & Co., 189, Fleet Street, London;' and being of great value, to wit, of the value of 5000*l.*; and ten other pieces of paper

of the value of one shilling: all the said several pieces of paper being the property of the said F. D. A., Esq.; and each and every of the said stamps being then and there available, and in full force and effect."

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On the part of the prosecution, a manuscript of an advertisement in the handwriting of the prisoner, left at the office of the Morning Post newspaper, was put in and read: it was as follows:—

"20,000*l.* Money to lend.—A gentleman retired from business has this sum unemployed, with the addition of a larger one in the funds, ready immediately to lend upon the promissory notes, bills of exchange, or other good personal security of gentlemen or persons of respectability, (either in one or more sums), who require but temporary assistance, and who feel desirous to avoid the expense of effecting mortgages on their property. Terms, for short periods, four and a half per cent. Particulars, stating amount required, time, and every other information, are requested to be made in the first instance, by letter, post paid, to Mr. T. Moreton, No. 35, University Street, Bedford Square, London, will be received in strict confidence, and meet early attention, if approved."

The prosecutor said—I live at Basing Park, Hants. In May last I had occasion for a sum of money: I saw an advertisement in the Morning Post. I wanted from 1 to 5000*l.* I addressed a letter to No. 35, University Street, Bedford Square, to Mr. T. Moreton. After sending that letter I saw the prisoner at the Swan Inn, at Alton, Hants, which is eight miles from Basing Park. I asked him if he could accommodate me with 1 or 5000*l.*, and upon what interest. He asked me who I was? I told him I was the son of Sir John Dugdale Astley, and that I had 60,000*l.* in the funds, upon which I wished to raise the money. The 60,000*l.* was vested in trustees, and not in my own name. It might form a security, but could not be taken out and sold. He told me that he thought he could accommodate me with the 5000*l.* I asked what rate of interest would

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be required. He said, I should have it at 6*l*. per cent., and that I might keep the money as long as I chose, provided that I paid the interest half-yearly. He produced ten blank stamps, and asked me to accept them. He produced the stamps from his pocket-book; he did not say what was to be done with them, nor did he give any reason why I was to accept them. I wrote on each of them the words, 'Payable at Messrs. Praed & Co., 189, Fleet-street, London,' and omitted to sign my name. Nothing was written on the stamps at that time but the words I wrote. I did not know what was to be done with these papers when I had delivered them to him. I did not authorize him to do any thing with them. I do not remember his mentioning any thing that was to be done with them. The prisoner wrote upon each of the stamps "500*l*." He asked what sum they should be for? and said, I think we will make them 500*l*. each. He wrote 500 in figures on each bill. He did this with ink. [Some of the bills were put into Mr. Astley's hands, and he could not find the figures he had spoken of; however, the figures "500*l*." were written at the upper left hand corner of each of them, but these figures were not stated by Mr. A. to be then written by the prisoner]. I wrote the words I have mentioned, and was not conscious of any defect."

A letter in the handwriting of the prisoner, addressed to Mr. Astley, but without either date or post-mark, was put in. It stated that there was a little irregularity in what had occurred.

Mr. Astley further said—"In consequence of this letter, I again saw the prisoner at Alton (*a*). He said I had omitted to sign my name. He again produced the ten pieces of paper. This was several days after I had given him the

(*a*) It is worthy of remark, that those stamps, in the county of Middlesex.
there was no evidence of any thing done by the prisoner, in respect of

papers. I signed them, and gave them to him again. He said he would send the money in a few days by the mail. The word "accepted" was written on each of them by me when I signed my name. I never received a farthing. Five of the bills have been returned to me. I paid nothing to have them returned. I know wheret he other five are."

Five of the bills were produced on the part of the prosecution. They were, with the exception of one, dated August 2, 1833, for 500*l.*, drawn by P. Clissold on Mr. Astley, and payable to the order of the drawer two months after date. The other bill was similar, except that it was drawn by Thomas Wilson; each of them was on a six-shilling stamp.

Mr. Clissold, the drawer and indorser, stated, that he knew nothing of Mr. Astley, and had no claim on him.

Alley, for the prisoner.—I submit that there is no pretence for saying that there is any thing like a case of felony proved. The question is not, whether there has been a fraud or a conspiracy, but whether there has been a felony? We know that, at common law, to steal a *chose in action* was no felony. And at common law, if these stamped papers were available securities, they were not the subject of larceny. The next question, therefore, is, whether they come within the provisions of any statute? In the early part of the reign of King George the Second, the stealing of promissory notes and bills was made a larceny. The statute then passed has been repealed; but the stat. 7 & 8 Geo. 4, c. 29, re-enacts its provisions so far as they relate to bills of exchange and promissory notes, extending the protection, however, to foreign securities, &c.; it will, therefore, be important to see what construction has been put upon the stat. of Geo. 2. The propositions I mean to submit are two. *First*, that the papers taken are not the subject of larceny, because they were of no value while in the prosecutor's hand; and, *secondly*, that, supposing they were the subject of larceny, still there was no felony, be-

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cause the paper stamps being the property of the prisoner, there was no trespass committed in the taking, which is essential in every case of felony.

On the first point I would submit that the statutes mean to say, that only perfect and available valuable securities shall be the subject of larceny; and, as the two statutes do not differ so far as they relate to the present case, I shall cite some authorities decided on the stat. of Geo. 2, to shew that that statute did not apply to incomplete instruments, or to instruments of no value; and I submit that an instrument which the holder, from whose possession it was taken, would be no richer for possessing, cannot be the subject of larceny. The instrument in question—for, to simplify the case, I will put it as if there was but one—is an instrument which only can become available in the possession of another. I will first refer to the case of *Mrs. Phipoe (a)*, which by mistake is sometimes called the case of *Mrs. Phipps*. In that case, *Mrs. Phipoe* caused *Mr. Courtoy*, a peruke-maker of very large fortune, to sign a promissory note, she holding a carving knife over him, and not only menacing him, but having cut one of his fingers to the bone. The Judges held, that this was no felony; and that this note was so far from being of any value to *Mr. Courtoy*, that he had not even the property of the paper on which it was written; for it appeared that both the paper and the ink were the property of *Mrs. Phipoe*. The stamp in that case belonged to the wrong-doer; and the charge being that of robbery must have included a larceny. There, too, the instrument was on the face of it a perfect, complete, and entire security; and it was an instrument that would have given a right of action against and *Mr. Courtoy* to the amount of 2000*l.*, and it was a good available security if it had not been obtained by duress; but in that case it was contended, and successfully, that it was no felony, as the instrument could never have been an

(a) 2 Leach, 673.

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available security, having been obtained by duress; and it was further contended, that there could be no larceny of the stamp, because it did not belong to Mr. Courtoy; and the Judges held, also, that there was no felony, because the instrument was of no value so long as it remained in the hands of Mr. Courtoy, if he could be said to have had it at all. So, if a country banker makes and signs one hundred promissory notes, payable to bearer on demand, so long as they remain in his possession they are not the subject of larceny. In a case tried before Lord Ellenborough at Carlisle, his Lordship held that it was no felony to steal banker's notes which had never been put into circulation, as no money was due upon them (a); and I would submit, that if I write a check on my banker payable to Mr. Adolphus, that check, so long as it remains in my possession, cannot be the subject of larceny; and the reason is, that, as long as I have the check, my banker's account stands exactly the same as it did; and I am not the richer for having the check. A person unlearned in legal principles might suppose that it was a felony to steal a gentleman's check before his face; but I beg leave to set those right who think so. The next case that I would refer to is that of Mr. Walsh (b). In that case, Mr. Walsh, who was a stock-broker, received bank notes at Messrs. Gosling's, for the check of his principal, Sir T. Plumer, and was directed to invest the amount in Exchequer bills; but, instead of so doing, ran away with the notes. It was held, that he could neither be indicted for stealing the check, for that was delivered to and applied by him as Sir T. Plumer intended, nor for stealing the bank notes, as they were never in the possession of Sir T. Plumer. I submit, that, if the papers taken in this case had been perfect instruments, there could not be sufficient to constitute a larceny.

(a) Christian's ed. of Black.
Com. Vol. iv. p. 234.

(b) 2 Leach, 1054; 4 Taunt.
258; R. & R. C. C. R. 215.

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LITLEDALE, J.—Mr. *Adolphus*, I think we ought to hear you. We will hear Mr. *Alley* in reply, if necessary.

Adolphus, for the prosecution.—In this case the stat. of 2 Geo. 2, c. 25, has been most correctly referred to; and I admit that the thing taken must be a security for money, and the property of the person from whom it was taken. The question in Mrs. Phipoe's case was, whether the note was ever the property of Mr. Courtoy? This case is very different. Here, a gentleman sees an advertisement which proffers him the loan of money; and the prisoner professes to tender him the means of raising it, and tenders him bill stamps for the purpose of his writing his acceptance on them. He writes his acceptance, and makes the stamps available for the largest sum of money those stamps will bear. In Mrs. Phipoe's case, the thing taken was a promissory note obtained by duress; but here, it is an acceptance which would make Mr. Astley liable. A promissory note unissued is of no value whatever, but the acceptance is the acknowledgment of owing a sum of money by him who puts his name to it. Mr. Hart, knowing Mr. Astley to be in want of money, says in effect—"The security for the advance is to be your acceptance, which I am to keep as long as you pay six per cent." That is the security given, and that is the security required. The securities at first are imperfect, but are afterwards made perfect by Mr. Astley; and there was then a perfect acceptance in the hands of the prisoner, and he might have made it his own. The case of Mrs. Phipoe is quite different. Mr. Courtoy never had the note to give away; but here, Mr. Astley was to give his acceptances for 5000*l.*, and to have the money for it; and he, in pursuance of that agreement, gives the acceptance, Mr. Hart producing the stamps, and he accepting; and when he had done so, the stamps became his, and Mr. Hart might charge him for them. In the case of *Evans v. Kymer and Another (a)*, a

(a) 1 B. & Adol. 528.

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bill had been drawn by a person named Nevett, and accepted by the plaintiff, for the purpose of being discounted and having the proceeds applied in the payment of other bills drawn by Nevett and accepted by the plaintiff; but the other bills, before they became due, being paid by the plaintiff, he directed Nevett to hold the first-mentioned bill for his (the plaintiff's) use, and not to part with it without his authority. Nevett, however, for his own purposes, indorsed it to the defendants for a valuable consideration, having first informed them that it belonged to the plaintiff, and that he (Nevett) had no authority to part with it. It was held, that the property in the bill was in the plaintiff, and that he might maintain trover for it; and in that case Mr. Justice J. Parke said—"The circumstance of the paper and stamp having been furnished by Nevett would not be sufficient to give Nevett the property in the bill, which would be in the plaintiff, subject to the right of Nevett to apply the bill in extinction of the joint liability, the object for which the bill was originally drawn. The object having been accomplished by other means, the bill was then held by Nevett at the plaintiff's disposal altogether. It was treated by Nevett as the plaintiff's property, and was his property." That case, therefore, applies here; for, I take it, that, wherever trover will lie, larceny may be committed.

BOSANQUET, J.—Trover may lie where the thing never has been in the possession of the party.

Adolphus.—I mean, if trover will lie of the thing taken. I will not argue the question of possession at present. I submit that Mr. Astley was liable for these stamps. Suppose that Mr. Hart had said, "Mr. Astley, I do not like you; I will have no more to do with you:" would not Mr. Astley have been liable for the value of the stamps thus spoiled by his writing on them? And I submit that they

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were available securities for 500*l.* each, as soon as Mr. Clissold wrote upon them.

LITLEDALE, J.—Supposing that the prisoner had been indicted for stealing in the dwelling-house of Mr. Astley, and had stolen these blank acceptances, how could you say that they were of the value of 500*l.* each? They would have been of no value, because they were unuttered.

Adolphus.—I am not anxious about the value: it is enough if the prisoner stole the stamps; and the question is, whether this be a stealing? I apprehend that the rule may be taken from Mr. Walsh's case. He had the check, and went to the banker's with Sir Thomas Plumer's consent. Here the prisoner obtained the acceptances by fraud and untrue means from the beginning. Mr. East, in his Pleas of the Crown (*a*), after giving the general definition of larceny, says, that it is the "wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." The question for the jury will therefore be, whether there was a delivery to the prisoner without fraud, or whether there was fraud from beginning to end? Was it true that the prisoner had 20,000*l.*, or was named Moreton? or was the whole matter a series of fraudulent contrivances to gain possession of the property of Mr. Astley? I submit, that, in the stamps at least, and, I should say, in the acceptances, there was that beneficial security created which made Mr. Astley liable; and I also submit, that, when the acceptance was put upon the paper, it became a security, and the subject of larceny. In Mr. Walsh's case there was no question whether the check

(*a*) Page 524.

was a security, but the question was, whether there was a trust in the first instance?

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BOLLAND, B.—There was another circumstance in that case. Sir Thomas Plumer had been pressed by Walsh to make the sale, and at first he did not, but at last he did, and the money was paid in at Robarts', and afterwards at Gosling's, and next day he obtained a check from Sir Thomas for the amount, and the jury found that there was an original fraudulent intent in the prisoner.

Adolphus.—That case differs from the present materially, because there was nothing false or fraudulent in the first obtaining of the money. The case in Christian is also very distinguishable from the present. If the bankers' correspondent had paid the notes, and they were sent back for the purpose of being re-issued, they are treated as of no value as notes; but here the acceptance was given for the express purpose of its being issued, and is, as I submit, of value to the amount that may be put upon it, and certainly to the amount of the stamp.

Clarkson, on the same side.—I submit that this is a case which ought to go to the jury, and is distinguishable from the cases cited, as there is a count in the indictment which charges the stealing sixteen pieces of paper with stamps of the value of 6s. each. It is perfectly clear, that, although we may not be able to satisfy the Court that the prisoner has stolen a security for money, he may still be convicted of stealing the papers with the stamps on them, if these stamps were the property of the prosecutor. In the case of *Evans v. Kymer*, it appeared that the plaintiff had never any possession or property in the bills, except by putting his name upon them; and that Nevett, instead of holding them, having converted them to his own use, it was held that trover would lie. With respect to Walsh's

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case, it is rather extraordinary, that, in one of the Reports, it is stated in the marginal note, that, as there was no fraud in the original obtaining of the check, it was not a larceny; but in the case itself, it is said that the prisoner contemplated a fraud when he got it. If it were to be found by the jury that there was no fraud in the advertisement, and that the prisoner had 20,000*l.* to lend, and that there was no fraud in the original proceeding, we might be said to be out of Court; but, as it seems to me, the question for the jury is, whether the whole machinery was not a fraud to get these securities and steal them? I would also observe, that in none of the cases cited by Mr. *Alley* was there a count for stealing the stamps. In the case of *Rex v. Vyse and Clark (a)*, where country bankers' notes had been paid, and while, being sent down to the country to be re-issued, were stolen, the prisoners were convicted on a count charging the notes to be pieces of paper with valuable stamps upon them, and all the Judges held the conviction right. Was there, in the present case, a piece of paper with a valuable stamp on it stolen? and, if so, was that in the possession of the prosecutor? The possession, in the case of *Evans v. Kymer*, was tantamount to the possession here; and I submit that there was, in this case, a paper with a stamp upon it, and that there was a possession in Mr. Astley sufficient to support an indictment for larceny. Mr. Starkie, in his Treatise on Evidence (*b*), says, that, to maintain an action of trover, "it is sufficient if the plaintiff has a special property in the goods; and it seems, that any temporary interest in the goods, either in his own right and for his own use, or by the authority of the law, for legal purposes, coupled with the right to take and keep possession, or to maintain a possession already subsisting, is sufficient." And, with respect to the property in the stamp,

(a) R. & M. C. C. R. 218.

(b) Page 832.

Mr. Astley was to pay 6*l.* per cent., which was to include every thing, and that would therefore include the stamps.

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BOLLAND, B.—That makes the other way. If Mr. Astley was to pay 6*l.* per cent., to include every thing, the prisoner would have to provide the stamps.

LITTLEDALE, J.—I do not find any thing in Mr. Astley's evidence as to the expenses being included in the 6*l.* per cent. Mr. Adolphus opened it so, and perhaps the fact was so.

The learned Judges having conferred together, their Lordships delivered their judgments *seriatim*.

LITTLEDALE, J.—It appears to me that there is not enough in this case to make out a charge of felony; however, I do not say any thing respecting any other prosecution that may be instituted. (His Lordship stated the different counts of the indictment). With respect to the first, second, and third counts, I am of opinion, that, when these acceptances were taken from the prosecutor, they were neither bills of exchange, orders, nor securities for money. It appears that Mr. Astley, in consequence of what he saw in a newspaper, wrote a letter, and that he afterwards had an interview with the prisoner, when the latter produced these stamps, upon which the prosecutor wrote the words—" Payable at Messrs. Praed's, No. 189, Fleet Street, London;" and as soon as that was done, the prisoner received them from Mr. Astley, and carried them away; and it seems, that, singularly enough, little or nothing was said as to what was to be done with the papers. It then appears that it was found that Mr. Astley's name was not put upon them; and at another meeting, the prisoner again produced the stamps, and Mr. Astley wrote the words " Accepted," and " F. D. Astley," there being at that time on the papers neither the name of any drawer nor any sum

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or date; but it seems, that, in the course of the discussion, it was stated that the stamps were to be used for bills of 500*l.* each. These papers were again taken away by the prisoner; and it appears to me, that, when they were so taken away, they were neither bills of exchange nor orders for the payment of money, but were only in a sort of embryo state, there being the means of making them bills of exchange. The stat. 7 & 8 Geo. 4, c. 29, s. 2, enacts, that, if any person shall steal any "bill, note, warrant, order, or other security whatsoever for money, or for payment of money, whether of this kingdom or any other state," the party is to be punished as he would be for stealing a chattel of the like value. Now, how could this be said to be of any value? and of what value can it be said to be? If these papers had been stolen from a dwelling-house, could they be charged to be of the value of 500*l.* each? There is no sum mentioned on them, and no drawer; and they being, as I before observed, but a kind of embryo security, I am of opinion that the first three counts of this indictment are not proved. There is, however, a fourth count, which describes the papers as ten pieces of paper, each having a six-shilling stamp; and upon this count the question is, whether the prisoner can be said to have stolen this property? As to the first three counts, I think the case turns on a mere question of law, which is, I think, entirely for the Court, as these papers do not come within the description contained in the stat. 7 & 8 Geo. 4, c. 29. The fourth count correctly describes them; but it seems to me that the circumstances under which they were obtained by the prisoner were not such as to make the prisoner liable for a felony. If a person by false representation obtains the possession of the property of another, intending to convert it to his own use, this is felony; but the property must have previously been in the possession of the person from whom it is charged to have been stolen. Now, I think that these papers, in the state in which they were, were the property of the prisoner. He

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took them from his pocket, and Mr. Astley never had them, except for the purpose of writing on them. They were never out of the prisoner's sight. Mr. Astley writes on them, as was intended, and the prisoner immediately has them again. I think that the prisoner cannot be considered as having committed a trespass in the taking, as they never were out of his possession at all. The case cited was a case in trover; and, to maintain trover, it is not necessary that the party should have manual possession of the goods: if he has a right of possession, that is sufficient. To support an indictment for larceny, there must be such a possession as would enable the party to maintain trespass. It has been incidentally mentioned that these stamps might be charged in account to Mr. Astley; but that could only be if the transaction was completed. However, we must only take into consideration that which occurred on the last occasion, when the words "Accepted" and "F. D. Astley" were written. Indeed, it appears to me, that on neither of the occasions when these parties met, can the prosecutor be said to have had either the property or the possession of these papers, so as to make the prisoner guilty of larceny in taking the papers out of the house. I do not say whether or not there is a fraud, but I am of opinion that this is not a case of felony.

BOLLAND, B.—If I entertained any doubt in this case, I should certainly have requested my brother LITLEDALE to have reserved it for the opinion of the Judges. The first three counts are for stealing bills of exchange, securities for money, and orders for the payment of money. I will, to simplify the argument, put it as if one only of these papers was taken, instead of the ten. Is the paper a bill of exchange? No: it was at first a six-shilling stamp, with the words "Payable at Messrs. Praed & Co.'s, No. 189, Fleet Street, London," written upon it. In its then state, no piece of paper could be more useless.

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However, it is brought to Mr. Astley again, and the word "Accepted," and his signature, are added; and it is in that state when it is charged to have been taken away. Can it, then, be called a bill of exchange? I should say, certainly not. In the next count it is called an order for payment of money; and that it clearly is not, as by it no money is directed to be paid; and it certainly cannot be called a security for money, as no money is even mentioned in it. Then comes the fourth count, which states that these were papers bearing certain stamps, and that the prisoner stole the papers with the stamps upon them. This question then arises—whether these papers were the property of Mr. Astley or of the prisoner? and on that point the case stands thus:—The prisoner, being solicited by the prosecutor to come into Hampshire, he does so, and the prisoner produces these stamps, and a negotiation takes place, in which it is ultimately arranged that the prisoner is to provide the prosecutor with money, at the exorbitant rate of 6*l.* per cent. There is no agreement that Mr. Astley is to pay for the stamps.

BOSANQUET, J.—I am of the same opinion; but, after what has been said by my learned brothers, I shall not give my reasons at any great length. The question is not, whether the prisoner is guilty of fraud, or whether he has acted improperly, but, whether he has committed a felony? The thing stolen (for I will take it as if there were only one) is charged to be a bill of exchange, an order for the payment of money, and a security for money. I do not think, that, at the time it was taken, it fell within either of those descriptions. There was no money mentioned in it, and no parties; and it seems to me quite impossible that the words written on it by Mr. Astley can bring it within the terms of either of the earlier counts of this indictment. The counsel for the prosecution feeling this, rely on a count which charges it to be a piece of paper with a stamp on it. It then becomes material to cor-

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sider whether the prisoner stole that from the prosecutor, as it is essential, to support that charge, that the thing taken was the property of the prosecutor, and stolen from him. Now, we find that the paper itself was produced by the prisoner, and that the stamp on it was his. He had purchased it, and it does not appear that the prosecutor ever paid for it. The prisoner produces it when both parties are in the room together, the prosecutor writes some words on it, and the prisoner then takes it away. Is that a stealing from the prosecutor? It is in the possession of the prisoner before it is ever placed before the prosecutor; and even if we take it that it ever was in the possession of Mr. Astley at all, it is given by him again to the prisoner. But, as it is produced by the prisoner, and he stays all the time Mr. Astley is writing, and when the writing is done he takes the paper up again, it seems to me that the stamp never was out of the possession of the prisoner. The case of Mrs. Phipoe bears very strongly upon the present, only in that case the instrument was a complete promissory note; and there the Judges were of opinion, that, however atrocious the circumstances, and, atrocious in that case they certainly were, it was not a case in which she could be convicted according to law; and nine of the Judges held that the note was procured by duress, and not by stealing. In that case Mrs. Phipoe produced the stamp, and made Mr. Courtoy put his name upon it. I therefore concur with my learned brothers, in thinking that this charge of larceny cannot be made out.

LITLEDAL, J., directed an acquittal.

Verdict—Not guilty.

Adolphus, and *Clarkson*, for the prosecution.

Alley, *Prendergast*, and *Bodkin*, for the prisoner.

[Attornies—*Henson & S.*, and *E. Isaacs.*]

1833.

As the following application arises out of the preceding case, we have here subjoined it.

Ex parte PALMER.

A. was indicted for larceny, as a principal, B. being charged, in the same indictment, with having received the stolen property from A. B. was tried at the Clerkenwell Sessions for the receiving, and was convicted and sentenced to be transported. A. was afterwards tried at the Old Bailey as the principal, and acquitted:—*Held*, that, although B. was imprisoned in Newgate, in pursuance of his sentence, the Judges at the Old Bailey had no jurisdiction to order his discharge.

ALLEY stated, that, in the same indictment on which the prisoner, John Minter Hart, had been acquitted in the preceding case, Henry Palmer was charged with having received the property from J. Minter Hart, knowing it to have been stolen; and that Palmer had been convicted at the Clerkenwell Sessions of that receiving, and sentenced to be transported, the prisoner, John Minter Hart, who was charged as the principal, being now acquitted. He therefore moved that the prisoner, Palmer, should be discharged. He also stated, that, at the Clerkenwell Sessions, he, as counsel for Palmer, had asked that judgment should be respited.

LITLEDALE, J.—I think that we have no authority.

Alley.—I submit, that, as Palmer is now a prisoner in Newgate, this Court has authority.

LITLEDALE, J.—Not with respect to a prisoner under sentence.

Alley.—Upon the face of this very record, the conviction of Palmer is manifestly wrong.

BOSANQUET, J.—If the objection is on the record, you can take advantage of it by writ of error; or, if any injustice has occurred, an application may be made to the Secretary of State.

LITLEDALE, J.—I think that we have no jurisdiction.

Application refused.

AN application was afterwards made to the Secretary of State for the Home Department, who caused the prisoner Palmer to be discharged.

BEFORE MR. JUSTICE LITLEDALE, AND MR. JUSTICE
BOSANQUET.

—♦—
REX v. JOHN MINTER HART.

LARCENY.—Indictment for stealing a bill of exchange for 30*l*., the property of James Stanhope.

The indictment had been found by the London Grand Jury, and in the margin were the words "London to wit." In the body of the indictment the prisoner was described as "late of London," but the place in which the offence was alleged to have been committed was stated to be "in the parish of St. Mary-le-Bow," without at all stating that the offence was committed in London.

Mr. Justice LITLEDALE, and Mr. Justice BOSANQUET, held that this was bad; and that it was not aided by the stat. 7 Geo. 4, c. 64, s. 20 (*a*), as that statute only aids the want of a proper or perfect venue, "where the Court shall appear by the indictment or information to have had jurisdiction over the offence;" which did not appear by the indictment here.

An acquittal was directed.

Adolphus, and *Clarkson*, for the prosecution.

Alley, *Prendergast*, and *Bodkin*, for the prisoner.

[Attornies—*Henson & S.*, and *E. Isaacs*.]

(*a*) Set forth in Carr. C. L. 40.

Dec. 5th.

An indictment for larceny had the words "London, to wit" in the margin, and described the prisoner as "late of London," and charged the offence to have been committed in the "parish of St. Mary-le-Bow," without averring that parish to be in London:—*Held* bad, and that this was not aided by the stat. 7 Geo. 4, c. 64, s. 20.

1833.

BEFORE MR. JUSTICE LITLEDALE, MR. BARON BOLLAND,
AND MR. JUSTICE BOSANQUET.

Dec 3rd.

REX v. JEREMIAH BORRETT.

On an indictment for embezzlement against a letter-carrier, charged under 2 W. 4, c. 4, as a person employed in the public service of his Majesty, it is not necessary to prove his appointment as a letter-carrier, but evidence of his having acted as such is sufficient.

If the wife of the party to whom a letter is directed pays the postage of the letter, she is entitled to demand an overcharge made for it; and a refusal on the part of the letter-carrier to account for it to her, is evidence of an embezzlement by him.

THE prisoner was indicted upon stat. 2 Will. 4, c. 4 (a), as a "person employed in the public service of his Majesty," for embezzling the overcharge of a letter which came to his hands as a letter-carrier. The letter was charged as a treble letter, and was, in fact, only a double one.

It was directed to Mr. Collins; but Mrs. Collins had taken it in, and paid the postage of it, and she alone had made any demand upon the prisoner for re-payment of the overcharge.

No evidence was offered of the prisoner's appointment as a letter-carrier; but one of the witnesses proved incidentally that he acted as such.

Stammers, for the prisoner, contended that the prisoner's appointment ought to have been proved; and that the letter being directed to Mr. Collins, he was the only person authorized to receive the overcharge, and that, consequently, as there had been no refusal to account to him, the embezzlement was not proved.

(a) That stat. enacts—"That if any person employed in the public service of his Majesty, and entrusted by virtue of such employment with the receipt, custody, management, or control of any chattel, money, or valuable security, shall embezzle the same, or any part thereof, or in any manner fraudulently apply or dispose of the same, or any part thereof, to his own use or benefit, or for any purpose whatsoever, except for the public service, every such offender shall be deemed to have

stolen the same."

By section 4, it is provided, that in such cases "it shall be lawful, in the order of committal, by the justice of the peace before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money, or valuable security as aforesaid, in the King's majesty."

By section 5, offenders may be tried in the county or place where they are apprehended.

Adolphus, and *Shepherd*, (with whom was *R. C. Scarlett*), contended that it was not necessary to prove the prisoner's appointment; that he had been proved to have been acting as a letter-carrier, and was therefore within the terms of the statute; and that with regard to the second objection, Mrs. Collins was the person who paid the postage of the letter, and, therefore, she was authorized to receive the rebate.

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 v.
 BORRETT.

The Judges present were of this opinion. The case went to the jury, and the prisoner was convicted.

Adolphus, *Shepherd*, and *R. Scarlett*, for the prosecution.

Stammers, for the prisoner.

[Attornies—*Peacock* and ———].

OXFORD SUMMER CIRCUIT, 1833.

—◆—
BEFORE LORD CHIEF JUSTICE TINDAL, AND MR. BARON
GURNEY.

—◆— BERKSHIRE ASSIZES.

BEFORE LORD CHIEF JUSTICE TINDAL.

1833.

July 11th.

A. devised the residue of a term determinable on lives to B. After the decease of the testator, the administrator with the will annexed paid the rent reserved on the term for six years, and charged it to B.: —*Held*, that this was sufficient evidence of his assent to the bequest to enable B. to maintain ejectment.

DOE on the Demise of MABBERLEY *v.* MABBERLEY.

EJECTMENT by the devisee of a term against the widow of the administrator with the will of the devisor annexed.

The lease of the term was determinable on lives, subject to a quit rent of 3*s.* 6*d.* a year, and it was produced by one of the persons upon whose life it was granted. The letters of administration were proved, and the possession of the devisor was also proved by the receipt of rent since the year 1806. To prove the administrator's assent to the bequest, it was shewn that the defendant's husband (the deceased administrator) had for several years paid the rent of 3*s.* 6*d.* a year to the lord at his court leet in behalf of the lessor of the plaintiff, and had, in an account in the defendant's handwriting rendered to the lessor of the plaintiff, debited the lessor of the plaintiff with several payments made between the years 1812 and 1818.

TINDAL, C. J., held that this evidence was sufficient to shew the assent of the administrator.

Verdict for the plaintiff.

Talfourd, Serjt., and *Tyrwhitt*, for the lessor of the plaintiff.

Shepherd, and *Justice*, for the defendant.

[Attornies—*Copeland*, and *Russell*.]

1833.

DOE
v.
MADDERLEY.

In the case of *Young v. Holmes*, 1 Str. 70, a term was devised to an executor for life, paying 50*l.* to J. T., remainder to the lessors of the plaintiff. It was held, that the executor took as executor, and not as legatee; and that the remainder over could not be considered to be executed without proof of a special assent by the executor; but it being subsequently proved that the executor had paid the 50*l.* charged, this was held a sufficient assent, and the plaintiff obtained a verdict.

In the case of *Doe d. Hayes v. Sturges*, 7 Taunt. 217, L. C. J. Gibbs says,—“The principle established in all the cases cited is, that if an executor in his manner of administering the property does any act which shews that he has assented to the legacy, that shall be taken as evidence of his assent to the legacy; but, if his acts are referable to his character of executor, they are not evidence of an assent.”

In the case of *Doe d. Sturges v. Tatchell*, 3 B. & Ad. 675, a testator, named *Batten*, bequeathed a term in a certain dwelling-house, &c., to *Robert Sharp*, his executor, &c., in trust to sell and dispose of the same as might seem

most advantageous, and apply the proceeds to the maintenance of the testator's son during his life. The testator bequeathed the remainder, after the son's decease, to such uses as his son should by will appoint, and he appointed *Robert Sharp* his executor. When the testator died, his journeyman, whose name was *Tatchell*, was managing the business on the premises, as he had done for some years; and the testator's son also resided there. At the funeral, he, *Sharp*, the executor, said, in the presence of the journeyman and others, “the house is young *Batten's* (the son's); *Tatchell*, (the journeyman), must stay in the house and go on with the business; but young *Batten* must have a biding place.” *Tatchell* continued on the premises paying no rent, but maintaining the testator's son, who was weak in intellect and unable to provide for himself. *Sharp*, the executor, lived twenty years afterwards, but did not further interfere with the property:—*Held*, that this was sufficient evidence of a disposal of the property by *Sharp* according to the trusts in the will, and that he had assented to take as legatee in trust, and not as executor.

1833.

OXFORD ASSIZES.

(Civil Side.)

BEFORE MR. BARON GURNEY.

July 15th. GREENWOOD, Administratrix of SAUNDERS, v. ELDRIDGE.

The prudent course for attorneys, when they enter into any arrangement with an opposite party, is to draw up a memorandum of the terms agreed upon and read it over to the party, and let him sign it.

ASSUMPSIT to recover half a year's rent due eighteen months after the death of the deceased.

The plaintiff claimed a year's rent of a copyhold for lives, held of the defendant, as due to her by the custom of the manor of Milton. It having been contended on the other side, that only half a year's rent was due beyond the rent of the current half year in which the last *cestui que vie* died; it was proved by Mr. Eyre, the plaintiff's attorney, that the defendant called on him and agreed, that, if five weeks' time were given to him, he would pay the amount claimed.

GURNEY, B.—Attornies, when they enter into any arrangement with an opposite party, ought always to draw up a memorandum of the terms agreed upon, and read it over to the party and let him sign it, and then there would never be any dispute as to what the agreement really was.

Maule, for the defendant.—A man can only be bound by what he contracts to do; if the defendant only asked five weeks' time to pay the undisputed part of the rent, and he and Mr. Eyre misunderstood each other, that is not a contract. To constitute a contract each party must have an intention of contracting.

GURNEY, B.—Left it to the jury to say, whether the defendant understood that he was agreeing to pay the

whole amount claimed by the plaintiff at the end of five weeks, or only the undisputed part of the claim.

1833.

Verdict for the defendant.

Talfourd, Serjt., and *Carrington*, for the plaintiff.

Maule, and *Cooper*, for the defendant.

[Attornies—*Eyre*, and *Hollier*.]

BEFORE LORD CHIEF JUSTICE TINDAL.

REX v. ROBERT HARRIS.

July 18th.

THE indictment, which was for a common law misdemeanor, charged the defendant with forging and uttering the following letter:—

“ Chastleton, May 10, 1833.

“ Sir,—I do hereby authorize you to discharge Robert Harris from your county gaol, Oxford, as James Mace and John Anker are become sureties, and become bound in a bond of 40*l.* each, for his appearance at the next general quarter sessions, Oxford, before me, one of his Majesty's justices of the peace for the said county of Oxford. I am, your's respectfully,

J. W. Jones.

“ To the Governor of the county gaol, Oxford.”

The defendant had been taken into custody on a warrant granted by Mr. Cooke, a magistrate of the county of Oxford, founded on the certificate of the clerk of the peace of that county, that an indictment had been preferred and found at the quarter sessions of the county, for an assault upon Joseph Wells. The warrant of Mr. Cooke recited that the defendant had refused to find sureties for his appearance at the next general quarter sessions, and to find sureties to keep the peace in the mean time. The commitment was “ till the said Robert Harris should find such sureties, or otherwise be discharged by due course of law.” Under this warrant the defendant was detained in the county gaol of Oxford; and the governor of the gaol, Mr.

An indictment had been found against A. for an assault, on which the clerk of the peace had granted a certificate, upon which a magistrate committed A. to the county gaol till he should find sureties, or otherwise be discharged by due course of law. A. wrote a forged letter in the name of another magistrate to the governor of the county gaol, stating that A. had found sureties, and authorizing the discharge of A.:—*Held*, that the writing and uttering of this forged letter was an indictable offence.

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 {
 REX
 v.
 HARRIS.

Grant, stated, in his cross-examination, that he was in the habit of receiving such letters from the magistrates in the case of prisoners committed for want of sureties, and that he always obeyed them after carrying the prisoner before another magistrate, who took the prisoner's own recognizance. The letter in question was so clumsy an imitation of Mr. Jones's handwriting, that Mr. Grant stated that he was not for an instant deceived by it.

Walesby, for the defendant.—I submit that an attempt to commit a misdemeanor is no legal offence; an attempt to commit a felony, no doubt, is a misdemeanor. The case of *R. v. Heath* (a), and the cases there cited, are authorities on this point. And I would further submit that a magistrate's letter to the governor of a county gaol is not a writing of that public nature, for the forgery of which an indictment at common law is sustainable (b).

The defendant was found guilty; but the Lord Chief Justice TINDAL entertaining doubts on the latter point, his Lordship respite judgment until the next assizes, that the opinion of the Judges might be obtained.

Maclean, for the prosecution.

Walesby, for the defendant.

[Attornies—*Davenport*, and ———.]

IN the ensuing Term this case was considered by the fifteen Judges, who held the conviction right.

(a) Russ. & R. C. C. 184.

(b) Sir W. Russell says (2 Cr. & M. 349), "There seem to be some strong opinions in the books, that the counterfeiting of any writings of an inferior nature to those above mentioned is not forgery at common law." The writings

above mentioned being "authentic matters of a public nature, as a privy seal, a license of the Barons of the Exchequer to compound a debt, or a certificate of holy orders," and also deeds and wills.

See the case of *Rex v. Collier*, ante, Vol. 5, p. 160.

1833.

WORCESTER ASSIZES.

(*Civil Side.*)

BEFORE MR. BARON GURNEY.

DOE on the Demise of DULLY *v.* ALLBUTT.

July 19th.

EJECTMENT. A witness called for the lessor of the plaintiff was objected to, as he had made himself liable to pay the attorney of the lessor of the plaintiff.

If a witness is incompetent on the ground that he has made himself liable to pay the attorney, a release to him by the attorney of "all fees, costs, and charges," is sufficient to render him competent.

The attorney executed a release, discharging the witness from "all fees, costs, and charges."

R. V. Richards, for the defendant.—That is insufficient; it ought to have been a release from all claims.

GURNEY, B.—I think it is sufficient. All claims must, under such circumstances as these, be made up of "fees, costs, and charges."

The witness was examined.

Verdict for the defendant.

Ludlow, Serjt., and *Godson*, for the lessor of the plaintiff.

R. V. Richards, and *Whateley*, for the defendant.

[Attornies—*Gitton*, and *Pardoe*.]

1833.

(Crown Side.)

BEFORE LORD CHIEF JUSTICE TINDAL.

July 19th.

REX v. JOHN FINDON.

In a case of felony, where the defence was an *alibi*, the witnesses for the prisoner stated that they respectively saw him at various places on his route from Gloucestershire to Warwickshire for two days before, and up to the time of the felony being committed:—*Held*, that the counsel for the prosecution might call a witness in reply, to prove that the prisoner had said he was at home on those days.

HORSE-STEALING. The prisoner was charged with stealing two mares, the property of John Perkins, on the night of Saturday, the 9th of March, 1833, at Hanbury. The evidence in chief against the prisoner was, that the mares were found in a stable of his father, adjoining the house in which his father lived, at Henley-in-Arden, in Warwickshire.

For the defence, several witnesses were called, who proved, that, on the 7th and 8th of March, they respectively saw the prisoner on his route from Gloucestershire to his father's house, which other witnesses proved that he reached on the evening of the 9th, on which night he slept at his father's house. All the places mentioned by the witnesses were many miles from the place at which the mares were stolen.

F. V. Lee, for the prosecution, proposed to recall a constable as a witness in reply; and to ask him what the prisoner had said as to where he was on the 7th and 8th of March.

Carrington, for the prisoner.—Anything that the prisoner said ought to have been given as evidence in chief; evidence in reply being only that which goes to answer the case on the part of the defence, without at all confirming the case on the part of the prosecution. This was held in the case of *Rex v. Hilditch (a)*.

F. V. Lee.—There the evidence offered in reply was

(a) *Ante*, Vol. 5, p. 299.

evidence to shew that the prisoner was near the place at which the robbery was committed; but what I propose to prove is, that the prisoner, when taken into custody on the 10th of March, said that he had been at home ever since the Wednesday before. Now, that could be no confirmation of my original case, but would go to the credit of those witnesses for the defence, who have spoken to the prisoner's being at particular places on the 7th and 8th.

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 v.
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TINDAL, C. J.—I think the evidence is receivable.

The question was put to the witness, but he could not prove the fact suggested.

Verdict—Not Guilty.

F. V. Lee, for the prosecution.

Carrington, for the prisoner.

[Attornies—*Robsons*, and *Noble*.]

REX v. The Inhabitants of UPTON-ON-SEVERN.

July 20th.

THE indictment stated, in the first count, that there was a highway leading from and through the town of Upton-on-Severn towards the parish of Great Malvern, and that from time immemorial there had been certain drains, gutters, and ditches, in, by, and through which the water off and from the said highway was accustomed to run and flow; that a portion of the said highway, commencing opposite a house occupied by H. G. S. L., in the said town of Upton, extended, &c., and that the said drains, &c., in, by, and along the said portion, at the parish of Upton, were and yet are choaked up, &c., by reason whereof large quantities of foul water and filth have accumulated in the said drains, &c., and have become putrid, &c., so that noxious vapours arise therefrom; that the inhabitants of the pa-

In an indictment for the non-repair of a highway, it must be affirmatively stated that the road is within the district which is bound to repair it. Stating a road to be out of repair "from and through" a place, excludes the terminus.

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 {
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rish of Upton ought to scour, open, and cleanse the said ditches. The second count stated, that there was a certain other highway leading from and through the town of Upton towards the parish of Great Malvern, commencing opposite the house of H. G. S. L., in the said town of Upton, and extending, &c., which was out of repair.

Curwood, for the defendants.—The second count does not aver that the highway is in any parish.

Lumley, contra.—That objection cannot be taken after plea, Lord Tenterden has so held.

TINDAL, C. J.—We hear it now to save time, instead of in arrest of judgment.

Curwood—The prosecutors have used the term “town;” now town may extend to more parishes than one. Town and parish are not necessarily the same thing.

TINDAL, C. J.—The question is, whether “town,” *prima facie*, denotes “parish.” They are not necessarily conterminous.

Curwood.—The second count is bad. By the words, “from and through,” (2 Hawk. P. C. 703) (*a*), the termini are excluded; and the case of *Rex v. Hartford* (*b*), are authorities on this point. Besides, the parish are not liable to cleanse the ditches, but the owners of the adjoining lands.

(*a*) Citing the case of *Rex v. Gamblingay*, 5 T. R. 513, in which it was held that an indictment against the parish of B. for not repairing a road leading “from A. to B.” is exclusive of B., and therefore bad; and that it was not aided by a subsequent allegation

that a certain part of the same highway, situate in B., is in decay.

(*b*) Cowp. Rep. 111. In that case Lord Mansfield says, that, in a presentment of a highway, the highway “must be alleged to lie in the parish, otherwise the parish is not bound to repair.”

Justice, contra.—The indictment states that the parish ought to repair.

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 }
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 SEVERN.

TINDAL, C. J.—That is merely the liability of law arising from the fact stated. Every precedent states that the road is in the parish. A township may be bound to repair by custom (*a*). In the second count the parish is not even named, which is mentioned in the first count. I do not see what right you have to refer to the first count. You must take the second count by itself; and then there is the statement, “from and through” Upton, which excludes the town; and then it states a certain part of the highway opposite the house of H. G. S. L., &c., to be out of repair. It does not appear to me that it even states the part out of repair to be in the town of Upton. It does not appear distinctly that it is in Upton; it is merely said to be opposite a house in Upton. It may be in another parish. Does the common law require the parish to cleanse the ditches?

Justice, and Lumley.—The ditches and drains are alleged to be in and part of the road.

TINDAL, C. J.—The effect of that is, that the road is out of repair. That is what is contained in the second count. It ought to be stated affirmatively that the road is within that district which is bound to repair it; that is not done here.

Indictment quashed.

Justice, and Lumley, for the prosecution.

Curwood, and Godson, for the defendants.

[Attornies—*Beale, and Clark & Skey.*]

(*a*) In the case of *Rex v. Kingmore*, 3 D. & R. 398, it was laid down that a parish is liable, as of common right, to repair all highways therein; but that an indictment will not lie against a district

called an extra-parochial hamlet, for not repairing a public highway within the same, unless some special ground of liability to repair is alleged.

1833.

WORCESTER CITY ASSIZE.

REX v. SMITH and Others.

July 22nd.

A police officer hearing a noise in a public house at one o'clock in the night entered the house, the door being open:—*Held*, that this was not a trespass.

INDICTMENT for assaulting Henry Sharp, a constable, in the execution of his office.

It appeared that the defendant, Smith, kept the Cock public-house, at Worcester, and that on the 7th of June, 1833, at half-past eleven o'clock at night, a night constable heard a disturbance in the house, and that he again heard a disturbance at half-past one; and that Sharp, who was the inspector of police at Worcester, being informed of it, went to the public-house, and finding the door ajar, he entered the house. The defendant, Smith, asked him what he wanted; and he said he was inspector of police, and desired the defendant to shut up his house, which he refused to do, and said he would turn Sharp out of the house. The assault was then committed.

Justice, for the defendants, submitted that the inspector of police was not justified in entering the house of the defendant Smith.

TINDAL, C. J., (in summing up).—It has been stated by the learned counsel for the defendants, that the inspector of police was not justified in entering the house of the defendant, Smith; but I think that that is not the law; and I think that he was justified under the circumstances, and that his entering the house was no trespass, as he found the door open. This is not like the case of a private house. It being a public-house he had a right to enter.

Verdict—Guilty.

Lee, for the prosecution.

Justice, for the defendants.

[Attornies—*Bedford*, and *Parker*.]

1833.

REX v. WILLIAM JOHN JONES.

July 22nd.

PERJURY. The indictment charged (in substance), that, at the general quarter sessions holden for the *county* of Worcester, Joseph Boote was indicted for stealing fifteen wooden bobbins and a quantity of worsted yarn, and John Underwood with receiving the same; and that, on the trial of that indictment, it became a material question, whether John Underwood was standing at his door when Boote left his (Underwood's) house? That the defendant, on the trial of that indictment in the *county of the city* of Worcester, falsely swore, &c.

A witness committed perjury at the Worcester *county* quarter sessions, which are held in the Guildhall of Worcester, which is situate in the *county of the city* of Worcester:—*Held*, that the indictment for this perjury might be preferred in the *county of the city* of Worcester.

It appeared, that the trial of the indictment against Boote and Underwood took place at the Worcestershire *county* quarter sessions, which are held in the Guildhall at Worcester, which is situate in the *county of the city* of Worcester, and that there the defendant gave his evidence on that trial.

Whitmore, for the defendant.—I submit, that, as this oath was taken on a trial at the quarter sessions for the county of Worcester, this indictment ought to have been preferred in the county, and not as it is in the county of the city. Laying a perjury committed in the Booth-hall at Gloucester to have been committed in the county of Gloucester, was held to be proper in the case of *Rex v. Gough (a)*, although the Booth-hall of Gloucester is locally situated within the county of the city of Gloucester.

F. V. Lee, for the prosecution.—Although that was held to be sufficient, it was conceded, in that case, that the indictment might have been preferred in the county of the city.

(a) Doug. 760. In that case, the Judges intimated an opinion that the indictment might have been preferred either in the *county of Gloucester*, or in the *county of the city* of Gloucester.

1833

REX
v.
JONES.

TINDAL, C. J.—Have you any authority to shew that an indictment for perjury is not good, if preferred in the place where the oath was actually taken?

Whitmore.—Nothing more than the doubts of the Judges, expressed in the case of *Rex v. Gough*.

TINDAL, C. J.—I cannot stop the case upon this objection.

An examined copy of the record of the conviction of Boote and Underwood was put in; and the evidence given on the trial of that indictment was proved by Sir Christopher Sidney Smith, Bart., the Chairman of the quarter sessions, who refreshed his memory from his notes. Two witnesses disproved the truth of that evidence.

Verdict—Guilty.

The defendant was sentenced to be transported for seven years.

F. V. Lee, for the prosecution.

Whitmore, for the defendant.

[Attornies—*Hallen & T.*, and *Wilson*.]

1833.

STAFFORD ASSIZES.

(*Civil Side.*)

BEFORE LORD CHIEF JUSTICE TINDAL.

DOE on the Demise of the Earl of LICHFIELD *v.*
STACEY.

EJECTMENT to recover a cottage.—Some accounts, signed by a deceased agent of the lessor of the plaintiff, but not in his handwriting, in which he charged himself with the receipt of certain sums as rent for this cottage, were offered in evidence.

R. V. Richards, for the defendant.—I submit, that these entries ought not to be read, as they are not in the agent's handwriting.

TINDAL, C. J.—As they are signed by the agent, it is exactly the same as if they were in his handwriting. He charges himself by these accounts, and admits the receipt of each item.

The entries were read.

It appeared that the defendant's father paid rent to the lessor of the plaintiff; and that, after the death of the defendant's father, the defendant continued to live with his mother in the cottage till her death.

It was proposed, on the part of the plaintiff, to prove payment of rent to the lessor of the plaintiff, by the mother after the father's death.

R. V. Richards.—This is not evidence against my client; he does not claim title through his mother.

July 24th.

In ejectment, evidence that the lessor of the plaintiff received rent for the premises from A., who formerly occupied them, and also from the parish officers, is admissible, although the defendant does not claim under either A. or the parish officers. Entries signed by a deceased agent, but not in his handwriting, but by which such agent charges himself, are receivable in evidence.

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 }
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TINDAL, C. J.—It is the receipt of rent from the person in possession. It is a fact.

The evidence was received.

It was proposed to shew, that rent was paid for this cottage to the lessor of the plaintiff by the parish officers.

R. V. Richards, objected to this evidence.

TINDAL, C. J.—It is a fact. I cannot exclude it.

The evidence was received.

Verdict for the plaintiff.

Talfourd, Serjt., and *W. J. Alexander*, for the plaintiff.

R. V. Richards, for the defendant.

[Attornies—*White & W.*, and *C. Flint*.]

July 24th.

BOWEN v. BRAMIDGE.

A., expecting an execution, executed a deed assigning all his property to trustees, for the benefit of all his creditors, after paying expenses, with a power to the trustees to retain money to pay the costs of

TROVER by the assignee, under a deed of assignment executed by one Peter Adshead, for the benefit of his creditors, against the defendant, an execution creditor of Adshead.

This action was directed to be brought by a rule of Court obtained under the Interpleader Act, (1 & 2 Will. 4, c. 58, s. 6) (a).

It appeared that the defendant, being a creditor of Ads-

an action which had been brought by J. S. against A. This deed was executed at 9 A.M. on the 25th of February. A writ of *f. fa.* was delivered to a sheriff's officer on the 24th, and by him delivered to the under-sheriff at 10 A.M. on the 25th:—*Held*, that the deed was good, notwithstanding the proviso to retain, and that the goods could not be taken under the *f. fa.*

(a) Which recites, that, "Whereas difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said Courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other

head, in November, 1832, sued him for his debt; Adshead gave a cognovit for debt and costs, payable by instalments; but, default being made in payment, judgment was entered up in the month of February following, and on the 24th of February a writ of *fiery facias* was given into the hands of a sheriff's officer, who caused it to be delivered at the under-sheriff's office between half past ten and eleven in the forenoon of the following day, the 25th. On the 25th, at half past nine in the morning, Adshead, having been for some time in insolvent circumstances, executed an assignment by deed of all his effects to the plaintiff, (an auctioneer and appraiser, but no creditor), for the benefit of all his creditors; under which deed possession was taken immediately after its execution. This deed contained the usual trust to convert the effects into money, and to collect the debts, and out of the proceeds to pay rent, taxes, and rates (if any), and the usual costs, " and to retain and pay the costs of defending, and (if needful) the plaintiff's costs on compromising or compounding a certain action commenced against the said Peter Adshead in the Court of Exchequer, by one

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persons not being the parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers;" and enacts, " That, when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the court from which such process issued, upon application of such sheriff or other officer made before or after

the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by rule of Court, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claims and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the Court."

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James Aldred," and then to divide the overplus equally amongst all the creditors of the said Peter Adshead executing the assignment. This assignment Adshead was desirous of making, and he had consulted his attorney on the subject, as long ago as the July preceding, on the occasion of his being arrested by another creditor, and before he had been served with the writ at the defendant's suit. On the sheriff levying under the *feri facias*, the plaintiff gave him notice of the assignment, and subsequently paid the amount into the sheriff's hands, to be retained by him until the rights of the parties were decided. In Easter Term the sheriff obtained a rule against the parties, under the Interpleader Act, on the hearing of which the Court directed that the sheriff should pay the amount of the levy into Court, and the present action be brought; and that the plaintiff should admit the seizure of the goods under a valid writ of *feri facias*, on the 25th of February; and that the defendant should admit the seizure to have been made by him, and under his direction.

Jervis, for the plaintiff, relied on the case of *Pickstock v. Lyster (a)*.

Talfourd, Serjt., for the defendant, submitted that the case of *Pickstock v. Lyster* was distinguishable from the present, the assignment, in the present case, containing, amongst others, a trust not necessarily for the general benefit of the creditors; and that the delivery of the writ of *feri facias* to the sheriff's officer, on the 24th of February, (the

(a) 3 M. & Sel. 371. In that case, a person named Glover, who was a debtor to the plaintiff, being sued by the plaintiff, he, pending the suit, and before execution, being insolvent, executed an assignment of all his effects to trustees, for the benefit of all his creditors, un-

der which possession was immediately taken; and it was held, that the assignment was not fraudulent within the stat. 13 Eliz. c. 5, although it was found by the jury that it was made to the intent to defeat the plaintiff of his execution.

day before the execution of the assignment), was in effect such a delivery to the sheriff as would bind the effects of Adshead within the meaning of the 29 Car. 2, c. 3, s. 16(a).

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TINDAL, C. J., said, that he would reserve both points, but did not think there was any thing in either; and directed the jury to find for the plaintiff, if they were satisfied that the assignment was executed and possession of the effects taken before the *feri facias* arrived at the under-sheriff's office.

Verdict for the plaintiff, with liberty for the defendant to move to enter a nonsuit (b).

Jervis, and *R. V. Richards*, for the plaintiff.

Talfourd, Serjt., and *Whateley*, for the defendant.

[Attornies—*Barnett*, and *Smith*.]

(a) By which it is enacted, "That no writ of *feri facias*, or other writ of execution, shall bind the property of the goods against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed; and, for the better manifestation of the said time, the

sheriff, under-sheriff, and coroner, their deputies and agents, shall, upon the receipt of any such writ, without fee for doing the same, indorse upon the back thereof the day of the month or year whereon he or they received the same." See Bac. Abr. tit. Execution, (I).

(b) No motion was made.

1833.

July 26th.

Where the declaration in an issue under the Interpleader Act states that "divers goods and chattels" were seized under a *fi. fa.*, and avers that "*the said goods and chattels*" were the property of the plaintiff, unless the plaintiff proves that *the whole* of the goods belong to him, the defendant will be entitled to a verdict; but *semble*, that, if part of the goods belonged to the plaintiff, the Judge would ask the jury to find specially.

If A., being in custody on a charge of felony, convey all his property in trust for his wife for life, and then in trust for his son, and on the next day A. be convicted of the felony, this conveyance will be void as against the crown.

MOREWOOD *v.* WILKES and Others.

ISSUE directed by the Court of Exchequer, under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 6(a).

The declaration stated, that "divers goods and chattels" had been seized on the 22d day of May, 1833, under colour of a writ of *fi. fa.*, issued on behalf of the defendant, against William Morewood; and that in a discourse which was had between the plaintiff and defendants, a question arose "whether *the said goods and chattels* were the property, and goods and chattels, of the said plaintiff at the time of their being so seized," &c.; and the plaintiff averred "that *the said goods and chattels*, at the time of their being so seized and taken as aforesaid, were the property, and goods and chattels of the said plaintiff." The plea stated that "*the said goods and chattels*, at the time of their being so seized and taken as aforesaid, were not the property, and goods and chattels, of the said plaintiff, in manner and form," &c.

It appeared, that, in the year 1811, William Morewood, the father of the plaintiff, being charged with felony, by a conveyance executed by him on the 13th of August, 1811, conveyed his goods to Thomas Harrold, in trust for the wife of William Morewood, to use them during her life; and after her death to sell them, and pay the proceeds to the plaintiff. William Morewood was tried and convicted of felony on the 14th of August, and sentenced to be transported for seven years; but after serving two years in the hulks, he was pardoned.

The subscribing witness to the deed stated, in his cross-examination, that the object of the deed was to prevent a forfeiture.

It further appeared, that, after the conviction of William Morewood, who was a baker, his wife and the plaintiff

continued to carry on the business of bakers; but that, when he returned from the hulks, he acted in the baking business, and bills for bread were made out in his name. It also appeared that William Morewood had brought an action of trespass, which was tried at the Stafford spring assizes, 1833, and in which a verdict had passed against him; and, a writ of *fiery facias* having been sued out for the costs in that case, the goods were seized, which were the subject of the present issue. The plaintiff claimed them, and the Court thereupon directed that the present issue should be tried—

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Maule, for the defendants, cited the case of *Shaw v. Bran(a)*.

TINDAL, C. J. (in summing up).—The question here is, whether *all* the goods seized were the property of the plaintiff, John Morewood; for, if they were not *all* his property, you ought to find a verdict for the defendants, as he asserts in the declaration that the goods seized were his, by which I understand that he asserts the whole of them to be his. It appears, that, in August, 1811, his fa-

(a) 1 Stark. 319. In that case it was held, that a deed, by which a felon on the eve of his trial for a capital offence assigns his property to another, cannot be supported without proof of consideration.

In the case of *Jones v. Ashurst*, Skin. 357, the plaintiff was the son of a person who was executed for robbery; and the plaintiff's father, being in Newgate, made a bill of sale of his goods; and it was held, that though a sale *bona fide* and for valuable consideration had been good, because the party had a property in the goods till con-

viction, yet such a conveyance as this cannot be intended to any other purpose than to prevent a forfeiture.

In the case of *Bullock v. Dodds*, 2 B. & A. 258, it was held, that, by attainder, all the personal property and rights of action in respect of property accruing to the party attainted, either before or after attainder, are vested in the crown, without office found; and, therefore, attainder may be well pleaded in bar to an action on a bill of exchange, indorsed to the plaintiff after his attainder.

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ther executed an assignment. There is no doubt that that deed was void as against the crown; but the question which I shall leave to you is, whether, by the conduct of the parties, the deed has not been considered as waste paper; and you will say whether, after the return of the father, it was not the intention of the parties that the goods should be his? I shall, to save subsequent inquiry, and not with a view to this verdict, ask you whether you think that any of the goods were the property of the plaintiff? You will first determine whether the goods in this house were the property of the plaintiff; and, if they were not, you will find for the defendants: and you will then state whether you are satisfied that any part of them belonged to the plaintiff.

The jury found a verdict for the defendants, and stated that they considered that none of the goods belonged to the plaintiff.

Ludlow, Serjt., and Godson, for the plaintiff.

Maule, and R. V. Richards, for the defendants.

[Attornies—*Thomas, and Foster*].

REX v. MILLS.

LARCENY. The prisoner was indicted for stealing fifteen bottles, the property of Samuel Fortescue. A constable, whilst he had the prisoner in custody, asked him whether he had committed the felony, which he denied. He then said—"It is of no use for you to deny it, for there is the man and boy who will swear they saw you do it."—*Held*, that this was such an inducement as would exclude evidence of what the prisoner said.

A constable said to a prisoner charged with felony—"It is of no use for you to deny it, for there is the man and boy who will swear they saw you do it."—*Held*, that this was such an inducement as would exclude evidence of what the prisoner said.

GURNEY, B.—That is an inducement to say something.
What the prisoner said, therefore, is not admissible.

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v.
MILLS.

Verdict—Not Guilty.

M' Mahon, for the prosecution.

Talbot, for the prisoner.

REX v. BUTTERIS and GROVE.

LARCENY.—The prisoners were both indicted for larceny as principals. It appeared that the prisoner Butteris (being in the service of prosecutor) was sent by him to deliver some fat to A. B. He did not deliver all the fat to A. B., having previously given part of it to Grove.

Godson, for the prisoners.—Grove ought to have been charged as a receiver.

GURNEY, B.—It is a question for the jury, whether he was present at the time of the separation. It was in the master's possession until the separation.

His Lordship left it to the jury to say, whether Grove was present when the separation was made, or received the fat afterwards.

A. and B. were indicted for larceny as principals. A. had been sent by his master to deliver goods to C. He only delivered part, and the rest was stolen, and found in the possession of B.: —*Held*, that it was a question for the jury, whether B. was present at the time when A. separated the portion stolen from the bulk; for that, if he was, both were rightly charged as principals.

The jury found the prisoner Butteris guilty,
and the prisoner Grove not guilty.

Kempson, for the prosecution.

Godson, for the prisoner.

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REX v. BENTLEY.

A prisoner before the magistrate made a statement, which by mistake was written in the information book, and headed—"The information and complaint of A. B.:"—*Held*, that it was not receivable, although the mistake could have been explained by the magistrate's clerk.

LARCENY.—The prisoner, when before the committing magistrate, made a statement, which erroneously was entered by the clerk in the information book, headed—"The information and complaint of R. B.," &c. The magistrate's clerk was at the trial, and could have explained the mistake.

GURNEY, B., rejected the statement.

Verdict—Guilty.

Kynnersley, for the prosecution.

REX v. HORWELL.

A count charging a prisoner with uttering a forged bill with intent to defraud A.B., and setting out the bill and the acceptance upon it, is not supported by proving that the prisoner uttered the bill, and that the acceptance on it was a forgery.

A count stated that the prisoner had a bill in his possession, (which was set out) with a forged acceptance on it (which was also set out) and that he, knowing the acceptance to be forged, uttered the bill with intent to defraud A. B. :—*Held*, not good.

FORGERY.—The *second* and *fourth* counts of the indictment were as follows—

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Samuel Horwell, afterwards (to wit), on the day and year first aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer, utter, dispose of, and put off a certain other forged bill of exchange (then and there knowing the same to be forged), which said last-mentioned forged bill of exchange is as follows—

£10 0 0.

Two months after date

Pounds for value received

To Messrs. Wood & Co.
Manufacturers, Shetton,
Staffordshire.

Accepted payable at
Messrs. Jones, Loyd & Co.
Bankers, London.
John Wood & Co.

Shetton, March 1st, 1833.

pay to my order Ten

as advised.

William Brown.

With intent to defraud the said John Alcock, Samuel Alcock, and Joseph Alcock; against the form of the statute in such case made and provided, and against the peace of our said lord the King, his crown and dignity.

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Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Samuel Horwell, on the day and year first aforesaid, at the parish aforesaid, in the county aforesaid, having in his custody and possession a certain other bill of exchange, which said last-mentioned bill of exchange is as follows—

£10 : 0 : 0.

Shetton, March 1st, 1833.

Two months after date pay to my order Ten Pounds for value received as advised.

To Messrs. Wood & Co.

William Brown.

Manufacturers, Shetton,
 Staffordshire.

With a certain forged acceptance on the said bill; which said last-mentioned forged acceptance is as follows: "Accepted payable at Messrs. Jones, Loyd & Co., Bankers, London. John Wood & Co."—afterwards, (to wit), on the day and year first aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did offer, utter, dispose of, and put off (then and there knowing the said last-mentioned acceptance to be forged,) the said last-mentioned bill of exchange, with intent to defraud the said John Alcock, Samuel Alcock, and Joseph Alcock; against the form of the statute in such case made and provided, and against the peace of our said lord the King, his crown and dignity.

It was proved that the acceptance was forged, but there was no evidence to shew that the signature of the drawer was not a genuine signature. The guilty knowledge of the prisoner was also proved.

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Greaves, for the prisoner.—I submit that the prisoner cannot be convicted on the second count, because the acceptance is no part of the bill within the stat. 1 Will. 4, c. 66. The statute has made a distinction between the bill and the acceptance, for it uses both terms. If proof of forging an acceptance will support a count for forging a bill, the word "acceptance" in the statute is wholly nugatory. I submit, also, that the fourth count is bad for not averring expressly that the prisoner uttered the forged acceptance.

Curwood, for the prosecution.—On the first point, I submit, that, as the bill was uttered with the forged acceptance on it, the acceptance must be taken to be part of the bill. And if there be a forgery of any material part of a bill, it may be charged as a forgery of the entire bill. With respect to the fourth count, it is alleged, that the prisoner had the bill with the forged acceptance on it, and that he afterwards uttered the bill, knowing the acceptance to have been forged. If he uttered the bill with the forged acceptance on it, he certainly must have uttered the acceptance.

GURNEY, B., having conferred with TINDAL, C. J., reserved the points for the consideration of the fifteen Judges.

Verdict—Guilty.

Curwood, for the prosecution.

Greaves, for the prisoner.

THE objections were afterwards considered by the fifteen Judges, who held the conviction wrong.

REX v. STOKES.

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MANSLAUGHTER.—The prisoner was charged with killing Jane Hodgkisson. After the jury were charged with the indictment, it appeared that the surgeon, who had examined the body of the deceased, was absent.

In a case of manslaughter, after the jury were charged, it was ascertained that the surgeon who examined the body was absent. The prisoner's counsel asked that the jury should be discharged :—*Held*, that if the prisoner asked that the jury should be discharged, the Judge had authority to order it to be done.

Greaves, for the prisoner, applied to have the trial postponed.

GURNEY, B. (having conferred with TINDAL, C. J.)—If the prisoner's counsel prays that the jury be discharged, we are of opinion that it may be done.

Greaves.—I pray that the jury be discharged.

GURNEY, B.—Let the jury be discharged.

The jury were discharged, and the prisoner tried next day and convicted.

C. Phillips, for the prosecution.

Greaves, for the prisoner.

See the case of *Rex v. Streek*, ante, Vol. 2, p. 413.

REX v. MARY SMITH.

MURDER.—The indictment charged the prisoner with the murder of a "certain female child, whose name to the jurors was unknown."

It appeared that the prisoner was a single woman. She mother, had said that she should like to have the child named "Mary Anne;" and, on two occasions afterwards, called the child "Mary Anne," and, on another occasion, "Little Mary." The prisoner's master, who was the father of the child, had stated to one of the witnesses for the prosecution that he was a Baptist. The indictment alleged the child to be "a certain female child, whose name to the jurors was unknown." The prisoner was convicted, and the fifteen Judges held the conviction right.

The deceased was a child twelve days old. It was not suggested that it had been baptized, but the prisoner, its

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was delivered of a female child on the 21st of June, at a lodging which she had provided for lying in. She was attended by a midwife, and no secret was made of the transaction.

On the morning of the 3rd of July, when the child was twelve days old, she left her lodging, taking the child with her, saying she was going home to Mr. Harrison's (her master's), and she drowned the child by throwing it into the canal that evening.

It appeared that the child had not been baptized; but, for the purpose of grounding an objection to the form of the indictment, questions were put by the prisoner's counsel, in cross-examination, to shew that the child had acquired a name by reputation.

The woman, at whose house the prisoner was delivered, said that she heard the prisoner say, during her confinement, that "she would have the child named Mary Anne; she should like it to be named Mary Anne." The midwife was asked if the prisoner did not call the child Mary Anne, and she said—Yes; and she said also, that the prisoner called the child Mary Anne when she saw it on another day; and the witness also said, "she caressed the child, and called it little Mary."

A woman, who had been a few weeks in the service of Mr. Harrison, (the master of the prisoner, and father of the child), and who gave evidence against the prisoner, was asked in cross-examination as to the sect to which Mr. Harrison belonged, and she said she had heard him say he was a Baptist.

Godson, for the prisoner.—I submit, that, on this evidence, the prisoner must be acquitted. There is evidence that this child was called Mary Anne. It is also proved that the father of the child is a Baptist; and, it being their custom only to baptize adults, any child of a person of that religious persuasion would have a name without baptism up to the age of thirteen or fourteen; and,

therefore, many observations which would apply to the children of members of the Church of England do not apply here; and, consequently, in childhood, the name given by parents of this persuasion is the name by which such a child must be described in an indictment. If the prisoner was acquitted on this indictment, she could not plead *autrefois acquit* to an indictment describing the child as Mary Anne, because she could not prove that it was as well known by the unknown name, (if I may so say), as by the name of Mary Anne, as it would be in evidence, that, whenever there was occasion to speak of the child by any name, the name of Mary Anne was used (a).

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F. V. Lee, on the same side.—In the case of *Rex v. Clark* (b), it was held, that, in an indictment for the murder of a bastard child, the child ought not to be described by its mother's surname, unless it had gained that name by reputation. In the present case, this child had acquired by reputation the name of Mary Anne; and by that name it ought to have been described. However, so far from describing it by name, this indictment does not even charge that it was the child of the prisoner. I submit, that, as it had acquired a name by reputation, it must be described by that name.

Godson referred to the case of *Rex v. Walker* (c).

GURNEY, B.—I think that this is a point well worthy of further consideration.

Verdict—Guilty. No sentence was passed, the Learned Baron reserving the case for the consideration of the fifteen Judges.

(a) See the case of *Rex v. Sheen*, ante, Vol. 2, p. 634.

(b) R. & R. C. C. 358.

(c) 3 Camp. 264. In that case an indictment against an accessory stated, that the accessory was committed by "a person to the

jurors unknown." The principal felon was a witness before the grand jury. Mr. Justice Le Blanc directed an acquittal, as the indictment was wrong in stating that the felony was committed by a person unknown.

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Rex

v.

SMITH.

*Corbett, and C. Phillips, for the prosecution.**Godson, and F. V. Lee, for the prisoner.*

IN the ensuing Term the case was considered by the fifteen Judges, who held the conviction right.

SHROPSHIRE ASSIZES.

(Civil side.)

BEFORE MR. BARON GURNEY.

COCKS v. NASH.

In an action on a promissory note, the defendant wished to give in evidence a composition deed executed by his mother and the plaintiff, and also by various of the defendant's creditors, but not by the defendant himself. It was in the hands of a trustee, who was willing to produce it, but the plaintiff's counsel objected:—*Held*, that the trustee ought not to produce it, but that the defendant might give in evidence an extract which had been furnished by the trustee, and which he, the trustee, proved to be a correct extract.

ASSUMPSIT on a promissory note. Plea—General issue.

The defence was, that there had been a composition with the creditors of the defendant; and on the part of the defendant Mr. Hammond was called. He produced a deed between Mrs. Nash, the mother of the defendant, of the first part; Mr. Hammond and the plaintiff, of the second part; and certain creditors, of the third part. By this deed Mr. Hammond and the plaintiff were constituted trustees for the payment of the debts of the defendant. Mr. Hammond stated that he held the deed as the trustee; that titles were held under it; that he was ready to produce it, and had Mrs. Nash's authority to do so.

Ludlow, Serjt., for the plaintiff.—The defendant is no party to the deed; he has no right to have the deed produced.

Jervis, for the defendant.—Where a party holds a deed in which others as well as himself are interested, he must produce the deed, if required by any party interested. This was held in the case of *Blakey v. Porter (a)*. If a party be interested, it is immaterial whether he be a party to the deed or not.

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v.
NASH.

GURNEY, B.—I do not know what the deed is. The defendant is no party to the deed—the plaintiff is; the plaintiff says, my interest is affected by the production of the deed: what right has the defendant to call upon him to produce the deed? The plaintiff says, you hold the deed for me: you have no right to produce it. However, if the plaintiff objects to its production, there is no doubt you are entitled to give secondary evidence.

An extract of the deed, furnished by Mr. Hammond to the defendant's attorney, the correctness of which was proved by Mr. Hammond, was offered in evidence.

Ludlow, Serjt., and *Whateley*.—This stands in the same situation as the deed. The same circumstances which prevent Mr. Hammond from producing the deed, prevent him from giving an extract of it. The plaintiff is entitled to the same protection against a copy as against the deed. Suppose the deed had been given by Mr. Hammond to the defendant's attorney, it would not have been allowed to be read; and, on the same ground, a copy given by Mr. Hammond cannot be read.

GURNEY, B.—It seems to me that the position of the parties is just the same as if Mr. Hammond had permitted the attorney for the defendant to read the deed. In that

(a) 1 Taunt. 386. In that case it was held, that, if only one part of an indenture be executed, the Court will compel the party having the custody of it to produce it for inspection, upon an action commenced against himself by the other party.

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case the attorney might prove the contents from memory; so here, I think, he may produce the extract.

The extract was then read.

Verdict for the plaintiff—Damages 85*l*.

Ludlow, Serjt., and *Whateley*, for the plaintiff.

Jervis, and *Talfourd*, Serjt., for the defendant.

[Attornies—*Anderson & Downes*, and *Kensit*].

IN the ensuing Term, *Talfourd*, Serjt., obtained a rule for a new trial, which was afterwards made absolute, for reducing the damages, on grounds not affecting the above points of law.

(*Crown Side.*)

BEFORE LORD CHIEF JUSTICE TINDAL.

REX v. JERVIS.

In an indictment for the substantive felony of receiving stolen goods, an allegation that the goods were stolen "by a certain evil-disposed person" is good, without stating the name of the principal felon, or averring that he is unknown.

INDICTMENT for receiving stolen goods, knowing them to have been stolen.

The *first* count charged the prisoner with having received the goods, knowing them to have been stolen by one Joseph Rudge. The *second* count charged the goods to have been stolen by "a certain evil-disposed person."

Lee, for the prisoner.—I submit that the second count is bad. It ought either to have stated the name of the principal, or else to have stated that he was unknown.

TINDAL, C. J.—It will do. The offence created by the act of parliament is not the receiving stolen goods from any particular person, but receiving them knowing them to have been stolen. The question, therefore, will be, whether the goods are stolen, and whether the prisoner

received them knowing them to have been stolen. Your objection is founded on the too particular form of the indictment. The statute makes the receiving of goods, knowing them to have been stolen, the offence (a).

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 {
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Verdict—Guilty.

Corbet, for the prosecution.

Lee, for the prisoner.

(a) By the stat. 7 & 8 Geo. 4, c. 29, s. 54, it is enacted, "That, if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law, or by virtue of this act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or

shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment: Provided always, that no person, howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence."

—◆—
 REX v. GEORGE HAYWARD.

Aug. 2nd.

THE prisoner was indicted for the wilful murder of John Corser, by stabbing him in the belly with a knife.

In a case of death by stabbing, if the jury are of opinion that the wound was given

by the prisoner while smarting under a provocation so recent and so strong, that the prisoner might be considered as not being at the moment the master of his own understanding, the offence will be manslaughter; but if there had been, after the provocation, sufficient time for the blood to cool, and for reason to resume its seat before the mortal wound was given, the offence will amount to murder; and if the prisoner displayed thought, contrivance, and design, in the mode of possessing himself of the weapon, and again replacing it immediately after the blow was struck, such exercise of contrivance and design denotes rather the presence of judgment and reason than of violent and ungovernable passion.

Any hope of recovery, however slight, existing in the mind of the deceased, at the time of his making a declaration, will render it inadmissible as a declaration *in articulo mortis*; but where a deceased knew that he must die, and the magistrate, previous to his declaration, desired him, as a dying man, to tell the truth, and he replied that he would:—*Held*, that his declarations were admissible.

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It appeared that the deceased and the prisoner were both labouring men, the prisoner occasionally carrying on the occupation of a butcher. On the evening of the 18th of July, the deceased was requested by his mother to turn the prisoner out of her house, which the deceased, after a short struggle with the prisoner, effected, and in doing so gave him one kick. On the latter leaving the house, he said to the deceased, "he would make him remember it," and instantly went up the street to his own lodging, which was distant from two to three hundred yards, where he was heard to pass through his bed-room, which was on the ground-floor, and also through an adjoining kitchen into a pantry, and thence to return hastily back again by the same way into the street. In this pantry the prisoner had a sharp butcher's knife, with which he usually ate, and which was kept on a shelf with his meat. He had also, in another part of the pantry, three other knives of a similar description, which he used in his business.

It was proved, that, within five minutes after the prisoner had left the deceased, the latter followed him up the street for the purpose of giving him back his hat, which had been left behind, and that they met at about ten yards' distance from the prisoner's lodging. They stopped for a short time, when they were heard talking together, but without any words of anger, by two persons, who passed by them, the deceased desiring the prisoner not to come down again to his mother's house that night, and the prisoner insisting that he would. After they had walked on together for about fifteen yards in the direction of the mother's house, the deceased gave the prisoner his hat, when the latter exclaimed, with an oath, that he would have his rights, and instantly stabbed the deceased with a knife, or some sharp instrument, in two places, giving him a slight wound in the shoulder, and a mortal wound in the belly. As soon as the prisoner had stabbed the deceased the second time, he said he had served him right,

and instantly ran back to his lodging, and was heard, as before, to pass hastily through his bed-room and the kitchen to the pantry, and thence back to his bed-room, where he undressed himself, and went to bed. Shortly afterwards he was apprehended, and no knife or other instrument was found upon him; but the several knives were found the next morning in their usual places in the pantry.

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TINDAL, C. J., told the jury, that if they were satisfied that the death of the deceased had been occasioned by the prisoner having stabbed him with a knife, or some other sharp instrument, of which there could be little doubt, the remaining and principal question for their consideration would be, whether the mortal wound was given by the prisoner while smarting under a provocation so recent and so strong, that the prisoner might not be considered at the moment the master of his own understanding; in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only: or whether there had been time for the blood to cool, and for reason to resume its seat, before the mortal wound was given; in which case the crime would amount to wilful murder. That, in determining this question, the most favourable circumstance for the prisoner was the shortness of time which elapsed between the original quarrel and the stabbing by the prisoner; but, on the other side, the jury must recollect that the weapon which inflicted the fatal wound was not at hand when the quarrel took place, but was sought for by the prisoner from a distant place. It would be for them to say, whether the prisoner had shewn thought, contrivance, and design, in the mode of possessing himself of this weapon, and again replacing it immediately after the blow was struck; for the exercise of contrivance and design denoted rather the presence of judgment and reason, than of violent and ungovernable passion.

The jury found the prisoner guilty of murder.

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IN the course of the trial a question arose whether the declarations of the deceased were admissible in evidence. As to which the facts were—that, after the surgeon had examined the wound, the deceased inquired whether he was in danger; to which the surgeon answered that he was, and the only chance of his living was keeping himself quite quiet; upon which it was contended, that the declarations made by the deceased were not made at a time when every hope in this world was gone, and when the party was aware that he must inevitably answer soon for the truth or falsehood of his statements; but that, upon the surgeon's statement, he must be taken to have had some hope of recovery. On which the Lord Chief Justice observed, that any hope of recovery, however slight, existing in the mind of the deceased at the time of the declarations made, would undoubtedly render the evidence of such declarations inadmissible. But, upon the further examination of the surgeon, it appeared, that before the declarations were made on the following evening, the deceased knew that he must die, and that the magistrate, previous to his receiving his declarations, desired him as a dying man to tell the truth; and that the deceased replied that he would. Upon this further evidence the declarations of the deceased were held to be admissible, and were laid before the jury.

Corbet, for the prosecution.

Bather, for the prisoner.

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HEREFORD ASSIZES.

(*Crown Side.*)

BEFORE MR. BARON GURNEY.

—♦—
 REX v. CELIA LEWIS.

Aug. 6th.

INDICTMENT on the stat. 9 Geo. 4, c. 31, s. 11 (*a*), for “administering” poison to Elizabeth Davis. There was a second count for “causing it to be taken.”

It appeared, that, soon after the prisoner had been at the shop of Mrs. Halford buying salt, the latter found a parcel containing half a pound of moist sugar, and an ounce of tea, on the shop counter. This parcel was directed “To be left at Mrs. Daws, Fownhope.” This parcel was sent by Mrs. Halford to Mrs. Elizabeth Davis, who used some of the sugar, which was found afterwards to contain corrosive sublimate. This caused Mrs. Davis to become very ill, but did not occasion her death.

It further appeared, that, on the day on which the prisoner was committed, she and several others were summoned before the Rev. Charles Bird, and examined on oath touching this poisoning, there being at first no specific charge against any person; but, on the conclusion of the examination, the prisoner was committed for trial on this charge. The prisoner was examined on oath, and her examination taken down, and in it she referred to a letter produced by her before Mr. Bird.

Greaves, for the prosecution, proposed to examine Mr. Bird as to what the prisoner said touching this letter.

GURNEY, B.—That cannot be done, as it is referred to in the examination.

If A. sends poison intending it for B. with intent to kill B., and it comes into the possession of C. who takes it, but does not die, A. may be indicted for a capital offence on the stat. 9 G. 4, c. 31, s. 11.

Several persons (one of whom was the prisoner) were summoned before the committing magistrate touching the poisoning of C. No person was then specifically charged with the offence. The prisoner was sworn and made a statement, and at the conclusion of the examination the prisoner was committed for trial:—*Held*, that this statement was not receivable in evidence against the prisoner.

(*a*) Set forth, ante, Vol. 4, p. 372, n.

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Greaves then proposed to put in the examination itself, and cited the case of *Rex v. Tubby* (a).

GURNEY, B.—This case is quite distinguishable from the case you have cited. Under the circumstances of that case I should have been disposed to agree with my Brother Vaughan. I remember in the case of *Rex v. Walker*, tried in the year 1806, which was a case of forging a will, I gave in evidence an affidavit made by one of the prisoners in the suit in Doctors' Commons, and the prisoner was convicted and executed (b). But this being a deposition made by the prisoner at the same time as all the other depositions on which she was committed, and on the very same day on which she was committed, I think it is not receivable. I do not think this examination was perfectly voluntary.

Greaves proposed to give evidence of what the prisoner said, which was not taken down; and cited the case of *Rex v. Harris* (c).

GURNEY, B.—It is very dangerous to admit such evidence, and I think that it ought not to be done in this case.

Greaves.—As the examination is not admissible, I submit that I am entitled to give parol evidence of its con-

(a) Ante, Vol. 5, p. 530.

(b) That case was tried before Lord Ellenborough, C. J., at the Old Bailey April Sessions, 1806. It was an indictment for forging the will of Major Hockings. The counsel for the prosecution were Mr. Gurney, Mr. Bolland, and Mr. Arabin. The counsel for the defence, Mr. Garrow, Mr. Knapp, Mr. Glead, and Mr. Alley.

(c) R. & M. C. C. R. 338. In

that case the prisoner was taken before the magistrate, charged with stealing an ewe of the prosecutor, and a sheep of a person named Pennell. The prisoner made a statement as to both. The magistrate took down what the prisoner said about Pennell's sheep, but not what he said about the prosecutor's ewe:—*Held*, that parol evidence of what the prisoner said as to stealing the ewe was admissible.

tents. In the case of *Rex v. Reed* (a), it was held, that if an examination of a prisoner, taken in writing, is inadmissible, by reason of irregularity in the mode of taking it, parol evidence of what the prisoner said may be received.

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GURNEY, B.—I do not think that I ought to receive the evidence.

The evidence was rejected.

GURNEY, B. (in summing up).—The question is, whether the prisoner laid this poison on the shop counter intending to kill some one. If it was intended for Mrs. Daws, and finds its way to Mrs. Davis, and she take it, the crime is as much within this act of Parliament as if it had been intended for Mrs. Davis. If a person sends poison with intent to kill one person, and another person takes that poison, it is just the same as if it had been intended for such other person (b).

Verdict—Not Guilty.

Greaves, and *Guppy*, for the prosecution.

C. Phillips, for the prisoner.

[Attornies—*Underwood*, and *Woodhouse*.]

(a) 1 M. & M. 403. In the report, no mention is made of what the irregularity was. The case was a case of murder, tried before Tindal, C. J., at Bridgewater, and the report states that the prisoner was executed.

(b) "In some cases a man shall be said, in the judgment of the

law, to kill one who is in truth actually killed by another, or by himself, as where one lays poison with an intent to kill one man, which is afterwards accidentally taken by another, who dies thereof." 1 Curw. Hawk. 92. See also the case of *Rex v. Hartry*, ante, Vol. 4, p. 369.

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MONMOUTH ASSIZES.

(Crown Side.)

BEFORE LORD CHIEF JUSTICE TINDAL.

Aug. 9th.

REX v. EDMUNDS.

A. gave a mortal blow to B., his master, who took out a summons against A. for an assault. The charge of assault was heard under this summons before Mr. D. and another magistrate, who summarily convicted A. of the assault. What was said by the parties before the magistrates was not taken down in writing. B. died:—*Held*, that, on the trial of A. for the murder of B., Mr. D. might give evidence of what B. said in the presence of A. at the hearing before the magistrates, and of what A. said in answer to it.

MURDER.—The prisoner was charged with the murder of William Rosser, by striking him with a mill peck.

It appeared that the deceased was a miller, and that on the night on which the blow was given, the prisoner, who was in his service, had had a quarrel with him, and that a few days afterwards the deceased made a complaint before the Rev. J. Davis, and the prisoner was in consequence brought before two magistrates on a charge of assault, on which the prisoner was convicted and fined.

The Rev. J. Davis, one of the magistrates, was called. He stated, that, on the examination of the charge of assault, the deceased made a statement, and the prisoner made a statement in answer to it. Neither of these statements was reduced into writing, as the case was one of summary conviction.

C. Watson, for the prosecution, proposed to ask Mr. Davis what the deceased and the prisoner said on this examination.

C. Phillips, for the prisoner, objected to this evidence, and cited the case of *Rex v. Jacobs (a)*.

TINDAL, C. J.—This being a summary conviction, is

(a) 1 Leach, 309. In that case the prisoners were charged with robbery, and it was held that parol evidence could not be given of the

examination of prisoners taken before the magistrate, as it must be intended that it was put into writing as the law requires.

not a case in which magistrates are required to take down the evidence in writing. If this was a case where the magistrates had not pursued their authority, it would be different.

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C. Phillips.—By the stat. 9 Geo. 4, c. 31, ss. 27 & 28 (a), the proceedings before the magistrate on a summary conviction for an assault are made evidence, and the adjudication is final in a civil action.

TINDAL, C. J.—That is a certificate.

C. Watson.—The act which gives the magistrates power to determine summarily does not require that the evidence should be taken down in writing, and the charge then made was not that which the prisoner has now to answer. I submit that I have a right to go into evidence of what the deceased said, and of what the prisoner said in answer.

TINDAL, C. J.—It appears to me, that, looking at the case cited and at the stat. 7 Geo. 4, c. 64 (b), and 9 Geo. 4, c. 31, the evidence is admissible. On examinations under the stat. 7 Geo. 4, c. 64, the magistrate is required to take the depositions on oath, and to reduce them into writing, so that they may be used on the trial if witnesses die. There the deposition itself is evidence in case of the death of the deponent, or a permanent inability in him to attend the trial. In the case cited, the deposition was not taken in writing, and the magistrate had not pursued his authority, that being a charge of felony. The present case is quite different. I shall, however, not hold, that what the deceased said is evidence, as proving the facts he stated, as it would be if it were a deposition taken under the stat. 7 Geo. 4, c. 64, but only evidence, as producing an answer from the prisoner, like any other conversation; and I do

(a) Set forth Carr. Supp. 339.

(b) Set forth Carr. Supp. 11.

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not think it is the less evidence because it is on oath. I shall therefore admit it as a conversation.

Mr. Davis gave evidence of what was said by the deceased on the examination, and also what was said by the prisoner in answer.

Verdict—Guilty of manslaughter.

C. Watson, for the prosecution.

C. Phillips, for the prisoner.

GLOUCESTER ASSIZES.

(*Civil Side.*)

BEFORE LORD CHIEF JUSTICE TINDAL.

HARPER *v.* TASWELL, Esq.

If goods be distrained for rent, the landlord must wait five whole days, i. e. five times 24 hours before he sells, and if he does not, he is liable to an action. Thus, where a distress was made on Friday at 2 P. M., and the sale was on the following Wednesday at 11 A. M., the sale was held to be wrongful.

CASE on the stat. 2 W. & M. c. 5, for selling goods distrained for rent within five days.

It appeared that the distress was taken on Friday the 1st of March, 1833, at two o'clock, and the goods were sold on Wednesday, the 6th of March, at about eleven o'clock. There were other irregularities in the distress.

TINDAL, C. J. (in summing up).—This action is brought for the infringement of a statute passed in the reign of William the Third. Before that time the landlord had no right to sell goods for rent in arrear, but the statute requires that he shall wait five whole days before he sells; the object of that is, that the tenant may have the five days in order to replevy the goods. It has been decided, as indeed the words of the statute shew, that he must wait

five whole days; that is, five times twenty-four hours. Here, the distress was taken at two o'clock on Friday the 1st of March; and, if we reckon five days, it brings us to Wednesday the 6th. But the goods were sold before two o'clock on that day, therefore the plaintiff had not the five days which the law intended. On that ground you ought to give a verdict for the plaintiff. It is not likely that he would have replevied, still it is a breach of the law; but as it is so slight you will probably give merely nominal damages.

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Verdict for the plaintiff—Damages 16*l*.

Talfourd, Serjt., and *R. V. Richards*, for the plaintiff.

Ludlow, Serjt., and *W. J. Alexander*, for the defendants.

[Attornies—*Winterbotham*, and *Crossman*.]

DAVIS v. NEST and Others.

TRESPASS.—The *first* count of the declaration stated, that the defendants broke and entered the plaintiff's house, situate in the parish of Bisley, and took away his goods, to wit, 1000lbs. of wool, 1000 lbs. of abb, 1000lbs. of warp, 1000 yards of flannel, 20 handkerchiefs, two hives, &c. The *second* count was for taking away "other goods and

In trespass against ten defendants for breaking the house of A. and taking his woollen yarn, the defendants may, under the general issue, shew that the yarn was afterwards

condemned under the stat. 17 Geo. 3, c. 56, in order to make out that A. could have no property in it. But the condemnation of the yarn, unless the parties had a search warrant, will not justify the entering of a house.

If yarn of a description liable to be condemned were found in the house of the plaintiff, magistrates have jurisdiction to condemn it under the statute, and to convict the plaintiff, although the yarn was not found on the execution of a search warrant previously granted; and, in an action by the plaintiff for taking it, the conviction is evidence for the defence, although it is founded on the evidence of one of the defendants.

The general rule is, that where a conviction adapts the state of facts to the words of the statute, that is sufficient; therefore, where a conviction on this statute stated that A. B. was convicted before the magistrates upon the oath of T. J., a credible witness, of having in his possession, in his dwelling-house, certain materials used in the woollen manufacture, suspected to be embezzled and purloined, to wit, &c., he not producing the party from whom he bought the same, or giving a satisfactory account, and then going on to adjudicate, is good.

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chattels" " of the like number," &c., as the goods in the first count. Pleas—*First*, Not guilty. *Second*, as to the breaking and entering in the first count mentioned, leave and licence. Replication—*De injuriâ* (a).

It appeared from the evidence of a witness named Hunt, called on the part of the plaintiff, that the defendants (who, as it afterwards appeared, were in search of persons who were suspected of having robbed the house of Mr. Hancox) (b) went to the house of the plaintiff, who was a clothier, keeping four looms, and, having entered the house, brought out a quantity of abb yarn in a pack sheet, some more in a bee-hive, and two rolls of flannel, containing about 25 or 26 yards in each. In his cross-examination this witness stated, that the plaintiff informed him that the flannel had been subsequently returned to him; and that he had been summoned before the magistrates and fined 20*l.* for having the abb yarn in his possession.

Jervis, for the defendants, opened, that he should prove that the defendants had entered the house by the permission of the plaintiff; and that the abb yarn, being taken before the magistrates, was condemned under the stat. 17 Geo. 3, c. 56 (c), and the plaintiff, therefore, could bring no action against the defendants for having taken it.

On the part of the defendants, it was proved, that they went in search of the persons who had committed the offence at Mr. Hancox's, and that about seven o'clock on the morning of Sunday, the 3rd of November, they went to the house of the plaintiff and demanded admittance,

(a) In addition to this replication, the plaintiff new assigned excess; but the defendant having demurred to it, the plaintiff struck out the new assignment. See the case of *Thomas v. Marsh*, ante,

Vol. 5, p. 596.

(b) See the case of *Rex v. Berrian*, ante, Vol. 5, p. 601.

(c) Set forth in Chitty's ed. of *Burn's Justice*, Vol. 5, p. 388—390.

when the door was opened from within; that they then entered, and finding the abb yarn and other articles of woollen manufacture, they took them away as before mentioned.

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Jervis, for the defendants, proposed to put in the conviction of the plaintiff for having these woollen articles in his possession.

Ludlow, Serjt., for the plaintiff.—There is no justification pleaded to the second count; and I submit that this conviction is not admissible in evidence under the general issue.

TINDAL, C. J.—This is an action for damages, in taking these woollen goods. The defendants may certainly shew that they were condemned in a regular way, to shew that the plaintiff could have no property in them.

Ludlow, Serjt.—This conviction cannot be good, as the property was not found in the plaintiff's house upon a search under the authority of a search warrant. By the stat. 17 Geo. 3, c. 56, s. 10, magistrates have a power of issuing a search warrant to search suspected places; and if, on that search, purloined or embezzled materials are found, the party, if he does not give a satisfactory account, may be punished; and, by sect. 11, constables are empowered to apprehend persons carrying or conveying such materials between sunset and sunrise; and such persons may be punished if they do not give a satisfactory account. The 14th section also speaks of "*such*" misdemeanors, which are either where the goods are found on a search warrant, or stopped in the night.

Cripps, on the same side.—The words of the 14th sec-

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tion tally exactly with those of the 10th. If the defendants had pleaded a justification under this act, they must have averred, and must have proved a search made under a warrant, according to the provisions of this act.

TINDAL, C. J.—The entry into the house cannot be justified, as there was no search warrant granted under the act of Parliament; but the defendants put their case on another ground, as they contend that the plaintiff cannot recover damages for the taking of their goods, as he could have no property in them. I see no objection to the validity of this conviction. My brother *Ludlow* says, that the 10th and 14th sections of the act of Parliament must be taken in connection with each other; but it seems to me that the obtaining of a search warrant to enter the house was not necessary to give the magistrates jurisdiction. If the *goods* be carried before the magistrates, is it to be said that they have no jurisdiction, because there was no search warrant? It seems to me that this is a valid conviction, and that it is admissible in evidence, not to justify the entry into the house, but to shew that the plaintiff claims damages for that which he had no title to.

The conviction was read.

The conviction was as follows:—Gloucestershire, to wit. Be it remembered, that, on the 8th day of February, in the third year of the reign of our sovereign lord William the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, and in the year of our Lord 1833, John Davis, of the parish of Bisley, in the county of Gloucester, weaver, is convicted before us, Henry Burgh, Robert Stephens Davies, and John Phillimore Hicks, Esq., three of his Majesty's Justices of the Peace acting in and for the said county, upon the oath of Thomas Jones, of the parish of Bisley aforesaid, in the

county aforesaid, clothier, a credible witness, of having in his the said John Davis's possession, in his dwelling-house, in the parish of Bisley, in the county aforesaid, on the 4th day of November, in the year of our Lord, 1832, certain materials used in the woollen manufacture, suspected to be embezzled and purloined, that is to say, seventeen pounds weight of woollen materials, consisting of woollen yarns and hair list yarns mixed together, eight pounds weight of woollen waste, thirteen pounds weight and half a pound weight of felt abb yarn, twelve pounds weight of woollen materials, consisting of warp yarn and list yarn, cut up and made into mops, [it enumerated a number of other articles]; which said materials were found in the possession of the said John Davis, in his dwelling-house, in the parish of Bisley aforesaid, in the county aforesaid, on the said 4th day of November, in the year of our Lord, 1832; and he the said John Davis not producing before us the said justices the party or parties duly entitled to dispose of the said materials, of whom he bought or received the same, nor given any satisfactory account to us the said justices how he came by the same, contrary to the statute in such case made and provided, we do hereby deem and adjudge the said John Davis to have been guilty of a misdemeanor; and we hereby also further adjudge the said John Davis to have forfeited, for such offence, the sum of 20*l.* of lawful money current in Great Britain, to be distributed in manner following, that is to say, the sum of 10*l.*, being one moiety or half part thereof, we do adjudge to be paid to Daniel Cox, of the parish of Bisley, in the said county, clothier, the informer; and the other moiety or half part thereof we do adjudge to be paid to the public charity or charitable institution called the Stroud Dispensary, situate and being at Stroud, in the county of Gloucester, or to the treasurer thereof for the time being, for and on account of the said public charity or charitable institution called the Stroud Dispen-

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sary. Given under our hands and seals the day and year first above written.

(Signed) Henry Burgh.
R. S. Davies.
J. Phillimore Hicks.

Cripps.—This conviction is founded on the evidence of Thomas Jones, who is one of the present defendants; and is, therefore, not receivable in evidence.

Ludlow, Serjt.—A party cannot obtain a conviction on his own evidence, and then use it as a defence to an action.

TINDAL, C. J.—This conviction is not on a collateral matter; I shall admit it.

Ludlow, Serjt., cited the cases of *Gibson v. Maccarty* (a), *Hilliard v. Grantham* (b), and *Brooke v. Carpenter* (c).

TINDAL, C. J.—These convictions are very often founded on the evidence of the person who makes the discovery. This is an action of trespass brought against ten defendants. How can I deprive the other nine of the benefit of it, even if Mr. Jones was not entitled to use it?

Ludlow, Serjt.—Your Lordship cannot deprive me of the objection, because it cannot be evidence in favour of the nine, without its also operating in favour of the defendant Jones.

TINDAL, C. J.—I see no objection to receiving this conviction in favour of the other nine defendants; because, if

(a) Rep. temp. Hard. 311. (b) Cited 2 Vcs. 246.
(c) 11 Moore, 59.

I did not, a plaintiff would only have to make a defendant of the person on whose evidence the party was convicted, and then he would exclude the defence.

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Ludlow, Serjt.—I submit that this conviction is bad. It ought to have stated that the goods were found on a search under a warrant. If this conviction be good, it would follow that a conviction for carrying and conveying suspected materials would be good. Now, that is no offence, if it be done in the day-time; and yet this word “night” does not occur in the 10th section of this act of Parliament

TINDAL, C. J.—It seems to me, as at present advised, that this conviction is good. The general rule is, that where a conviction adapts the state of facts to the words of the statute, that is sufficient.

It was proved by Mr. Jesse Davis that he was before the magistrates at the time of the conviction, when Mr. Houseman attended as attorney for the present plaintiff.

Ludlow, Serjt.—I must object to hearing any thing that Mr. Houseman said.

TINDAL, C. J.—I think the witness ought not to be asked as to what Mr. Houseman said as to the facts of the case.

Jervis, proposed to ask whether Mr. Houseman, on the behalf of the present plaintiff, demanded the return of the yarn.

TINDAL, C. J.—That is a part of the *res gestæ*.

The witness stated that Mr. Houseman did so.

It was proved by Mr. Davies, one of the magistrates

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who signed the conviction, and who was also a cloth manufacturer, that the yarn consisted of portions made from wools of various qualities, and that different parts of it were in different stages of manufacture, and that it was altogether such as would not be bought in the regular course of business.

Ludlow, Serjt.—The defendants had no right to take away the pack sheet and the bee-hive. They ought not to have done that.

Jervis.—It was quite essential that they should do so, that the things should be produced before the magistrates in exactly the same state in which they were found.

TINDAL, C. J., (in summing up.)—This is an action for breaking and entering the plaintiff's house, and taking his goods. Now, with respect to the taking of the yarn, that depends upon whether it can be considered as the property of the plaintiff; because, if that yarn was of a description to come within the terms of the act of Parliament that has been cited, the plaintiff could have no property in it; and, therefore, cannot recover any damages for the taking it away. With respect to the taking of the flannel, the plaintiff is entitled to some damages. It appears, that that was afterwards returned to the plaintiff, but he will be still entitled to some damages for the taking of it; and with regard to the breaking and entering the house, the defendants were not justified in entering it, unless they did so by the consent of the owner. If they entered without the consent of the plaintiff, you will also give some further damages for that also.

Verdict for the plaintiff, damages 5*l.* for entering the house, and 40*s.* for taking the flannel.

Ludlow, Serjt., and *Cripps*, for the plaintiff.

Jervis, *Phillpotts*, and *M'Lean*, for the defendants.

[Attornies—*Houseman*, and *Newman & Son*,—*Hawker & Fryer*.]

1833.

(*Crown Side.*)

BEFORE MR. BARON GURNEY.

REX v. WALKLEY and CHARLOTTE CLIFFORD.

LARCENY.—The prisoner Walkley was charged with stealing two gowns, the other prisoner being charged with receiving them.

Alexander was examining as to a statement made by the prisoner Clifford, in the absence of the other, and was directing the witness not to mention the name of the other.

GURNEY, B.—We must have exactly what was said. The point has been much considered by the Judges. We must hear the whole statement, otherwise it becomes mutilated.

The witness stated that he said to her, “It would have been better if you had told at first.”

GURNEY, B.—That is an inducement. It amounts to this, that, if it would have been better then, it would be better now. I think it hardly safe to admit the evidence after that.

Evidence rejected.

Alexander, for the prosecution.

See the cases of *Rex v. Hearne*, 1d. 221; and *Rex v. Fletcher*, Id. ante, Vol. 4, p. 215; *Rex v. Clewes*, 250.

If a prisoner in making a statement mention the name of another prisoner, the witness who gives evidence of the statement must state exactly what the prisoner said, without omitting the name of the other prisoner.

If the witness said to the prisoner, “It would have been better if you had told at first,” this is an inducement to confess, and will render a statement made thereupon inadmissible.

1833.

REX v. HOGG and Others.

Where a prosecutrix in a case of felony be bed-ridden, and there be no probability that she would be ever able to leave her house, the Judge will admit her deposition before the magistrate, the same as if she were dead.

LARCENY.—The prosecutrix was an old woman bed-ridden, and there was no probability that she would ever be able to leave her house again.

GURNEY, B., allowed her examination taken before the committing magistrate to be read, saying there would be no use in putting off the trial till another assizes, as there was no likelihood of her ever being able to attend(a).

(a) See the case of *Rex v. Savage*, ante, Vol. 5, p. 143; and see ante, p. 165.

REX v. YEND and HAINES.

A. had agisted his horse with B., who lived fourteen miles from him, and, in consequence of hearing of the loss of it, he went to the field of B., where it was not:—*Held* to be not sufficient proof of loss to support an indictment for horse-stealing.

HORSE-STEALING.—The prisoners were indicted for stealing a horse, the property of Mr. Lord. The prosecutor proved that he had put the stolen horse to be agisted with a person who resided twelve miles distant from his own residence; that, in consequence of hearing of its loss from that person, he went to the field where the horse had been put to feed, and discovered that it was gone.

GURNEY, B.—I think you should prove the loss more distinctly, because *non constat* but the prisoners might have obtained possession of the horse honestly. I do not see how we can get at that, without the person with whom it was put to agist, or his servant. It is perfectly consistent with what has been proved, that the horse might have got out of this person's possession in some other way, and not by felony.

Verdict—Not Guilty.

1833.

REX v. DAVIS and Another.

THE prisoners, who were father and daughter, the former being a pawnbroker at Cheltenham, were indicted as receivers on several indictments, which charged them with receiving sheets and various articles of linen, the property of Thomas Liddell, the proprietor of Liddell's Hotel, at Cheltenham.

It appeared that the goods laid in the first indictment were found, together with many other goods of the prosecutor, at the house of the elder prisoner, marked with his mark.

GURNEY, B.—A particular line is now fixed upon. All is evidence with a view to the *scienter*. There is no excluding the evidence of the other articles being found; but I do not think you should go farther. As far as you have now gone, it is regular, that is, that a number of other things with the prosecutor's marks upon them were found.

It was then proposed to prove that the two prisoners had received the articles into pawn at various times.

GURNEY, B.—Any pawnings that were before those laid in the indictment are evidence.

It was proposed to give evidence of the pawning of another article which was the subject of another indictment.

GURNEY, B.—I hesitate very much whether it is not evidence. I think, strictly speaking, it is evidence; but I think, as a matter of candour, you ought to waive the other indictment, if you give it in evidence upon this.

A witness stated that he took one of the tickets to the younger prisoner to learn whose handwriting it was.

If prisoners be charged by several indictments with receiving stolen goods:—*Seemle*, that, in strict law, any receiving that was before the one in the indictment which is being tried may be given in evidence, although itself the subject of another indictment; but, if given in evidence, the other indictment ought, as matter of candour, to be given up.

When, before the committing magistrate, one of the prisoners was examined as a witness against the other, and, after being examined, was charged as a prisoner:—*Held*, that what the prisoner said before the magistrate as a witness could not be given in evidence against her on her trial for the offence.

It makes no difference whether a receiver receives for the purpose of profit or advantage, or whether he does it to assist the thief.

1833.
} **REX**
v.
DAVIS.

GURNEY, B.—If what she said was about her own handwriting, it is evidence; if about any other person's, it is not. Witness, select any ticket where she spoke about her own handwriting. Did she say any of those were her handwriting?

The witness.—She said these five were her writing.

It appeared that the younger prisoner had been a witness before the magistrate, and it was proposed to ask what she said then in the presence of her father.

GURNEY, B.—I think you cannot do that. We cannot hear anything she said before the magistrate when she was a witness. If, after having been a witness, you make her a prisoner, nothing of what was said then can be admitted as evidence.

It was proved that the principal had taken the goods from the house of Mrs. Durham, who was the washerwoman employed by the prosecutor. She was employed to carry the linen back to the prosecutor's by Mrs. Durham, whose servant she was.

C. Phillips, and *F. V. Lee*, for the prisoners, submitted, that this offence was provided for by 39 & 40 Geo. 3, c. 99, s. 11, and was not felony, there being no conversion.

GURNEY, B.—If the receiver takes without any profit or advantage, or whether it be for the purpose of profit or not, or merely to assist the thief, it is precisely the same.

The prisoners were acquitted on the merits.

Curwood, and *Godson*, for the prosecution.

C. Phillips, and *F. V. Lee*, for the prisoners.

[Attornies—*Packwood*, and *Harmer & Co.*]

1833.

REX v. BENNETT.

MANSLAUGHTER.

C. Watson objected to the coroner's inquisition, because, although the jurors' names were set out at length in the inquisition, one of them had signed it "Wm. Seaton."

It is no objection to a coroner's inquisition, that one of the jurors did not sign his Christian name at length, if the names be set out at length in the body of the inquisition.

GURNEY, B.—Is every man bound to sign at full length? I cannot require any such thing.

Verdict—Guilty.

Justice, for the prosecution.

C. Watson, for the prisoner.

REX v. CHARLOTTE LONG.

ARSON.—The prisoner having been charged on oath before Mr. Purnell, a magistrate, by an accessory before the fact, named Elizabeth Burford, with having set fire to three hay ricks belonging respectively to Mr. Gillman, Mr. Organ, and Mr. Nichol. The constable and Exell went to apprehend her with a warrant, specifying all the three charges, and stating them to have been made on the oath of the accessory. When the prisoner was apprehended she was told that there was a very serious oath laid against her by Betsy Burford, who had sworn that she had set fire to Organ's, Nichol's, and Gillman's ricks.

A. was charged with setting fire to the ricks of B., C., and D., upon the oath of E., an accessory before the fact, and a warrant to apprehend A. was granted, mentioning all the three charges, and stating them to be made on the oath of E. The person who apprehended A. told her that "a very serious oath had been made against her by

The prisoner then made a statement.

E." on these three charges. After this A. made a statement, which was received in evidence. A. set fire to the ricks of B., C., and D., one immediately after the other. There were three indictments, one for each fire. The rick burnt last was the subject of the indictment first tried. An accessory before the fact was called, and was allowed to give evidence of the whole transaction as to the three ricks.

1833.

REX

v.

LONG.

GURNEY, B., allowed this statement to be given in evidence.

There were three indictments against the prisoner, one for firing each rick. The ricks were all set on fire one immediately after the other, and were within sight of each other. The strongest evidence being as to the last, that indictment was tried first. The confession, however, related to all three, and the evidence of the accomplice as to all was admitted, as all constituting part of the same transaction.

Verdict—Guilty.

Alexander, and Greaves, for the prosecution.

GLOUCESTER CITY ASSIZES.

BEFORE LORD CHIEF JUSTICE TINDAL.

SMITH v. WILKINS and Another.

If, in an action for goods sold, the question be, whether the credit was given to the defendant's wife or to her father, evidence that other persons had given credit to the father is not receivable.

ASSUMPSIT for goods sold and delivered. The defence was, that the credit was given to the father of defendant's wife.

Ludlow, Serjt., proposed to give in evidence that other tradesmen had given credit to the father.

TINDAL, C. J.—It is a matter of individual credit, and I think that the evidence cannot be received.

The evidence was rejected.

Verdict for the defendant.

Talfourd, Serjt., and *Phillpotts*, for the plaintiff.

Ludlow, Serjt., *C. Phillips*, and *Busby*, for the defendant.

[Attornies—*Hulls*, and *Smallridge*.]

1833.

REX v. CHADWICK.

FALSE pretences.—The prisoner obtained the goods by means of a false letter, in the following terms:—

Where a false pretence was contained in a false letter, which was lost before the trial, the prisoner was convicted on parol evidence of its contents.

“Sir,—Please to deliver one crate to the bearer, and by so doing you will oblige me.

“Wm. Tow.”

Across the end of the paper had been written—

“Sir,—The sum of four pounds has been paid into my hands.”

Before the trial the original paper had been lost.

TINDAL, C. J., allowed parol evidence to be given of its contents, and the prisoner was convicted.

Alexander, for the prosecution.

[Attorney, *W. Brown*.]

See the cases of *Rex v. Hunter*, ante, Vol. 4, p. 123, and *Rex v. Haworth*, ante, Vol. 4, p. 254.

1833.

WESTERN CIRCUIT.

BEFORE MR. JUSTICE ALDERSON AND MR. JUSTICE PATTESON.

WINCHESTER ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE PATTESON.

July 10th.

REX v. TARRANT.

A prisoner charged with felony made a statement before the committing magistrate, which was taken down, and signed by the prisoner, but there was nothing on the face of the paper to shew, that, at the time the prisoner made the statement, he was under examination on a charge of felony:—*Held*, that this examination could not be used as an examination taken under the stat. 7 Geo. 4, c. 64, but that the clerk to the magistrates might state what the prisoner said, using the paper to refresh his memory

HOUSEBREAKING.—The prisoner was charged with breaking into the house of Sarah Vernon, and stealing bacon. The prisoner had been examined before the magistrates, and his examination reduced into writing by the magistrates' clerk, and signed by the magistrates, but nothing appeared on the face of the paper to shew that it was an examination taken on a charge of any felony, or that the magistrates who signed it were then acting as magistrates.

PATTESON, J.—The clerk to the magistrates may be called to prove what the prisoner said, and refresh his memory from this paper.

Dampier, for the prosecution.

Missing, for the prisoner.

state what the prisoner said, using the paper to refresh his memory

REX v. PRESSLY.

July 11th.

LARCENY.—When before the committing magistrate the prisoner made a statement, which was taken down by the clerk to the magistrates, and read over to the prisoner, but not signed by him.

A prisoner charged with felony made a statement before the committing magistrates, which was taken down in writing, but not signed by the prisoner : —*Seemle*, that the magistrates' clerk should give evidence of what the prisoner said, using that which was taken down to refresh his memory.

Missing, for the prisoner, submitted, that this examination could not be received in evidence, as it was not signed by the prisoner.

PATTESON, J.—I think that it would be the more safe course, that this examination should not be read ; but that the clerk to the magistrates, by whom it was taken, should refresh his memory from it.

Verdict—Guilty.

Sewell, for the prosecution.

Missing, for the prisoner.

1833.

WELCH SPRING CIRCUIT, 1833.

BEFORE MR. BARON BAYLEY AND MR. JUSTICE PATTESON.

BRECON ASSIZES.

BEFORE MR. JUSTICE PATTESON.

REX *v.* BRIGSTOCK.

A libel stated, that there was a riot at C., and that a person fired a pistol at an assemblage of persons, and upon this imputed neglect of duty to the magistrates:—*Held*, that, on the trial of a criminal information for this libel on the magistrates, the defendant's counsel, with a view of shewing that the libel did not exceed the bounds of free discussion, could not go into evidence to prove that there was in fact a riot, and that a pistol was in fact fired at the people.

THIS was a criminal information against the defendant, who was the publisher of the Welchman newspaper, for a libel on the magistrates of the borough of Carmarthen. The libel was contained in an article which gave an account of the proceedings in the Court of King's Bench, on the trial of the case of *Rex v. Pinney, Esq. (a)*, and consisted of an application of the speech of the Attorney-General, on that occasion, to the circumstances of the borough of Carmarthen on the Mayor's day; and it imputed to the magistrates that they had neglected their duty, in refusing, when called upon, to interfere to preserve the peace in the borough during a riot which occurred on that day, and neglecting and refusing to bring to justice one of the persons engaged in that riot, who had fired a pistol on the assembled people, and wounded several of them, that person being one of the same political party as the magistrates.

John Evans, for the defendant.—I purpose to go into

(a) *Ante*, Vol. 5, p. 254.

evidence to prove that there was a riot on the Mayor's day; that the magistrates refused to interfere; and that the person referred to in the libel did fire on the people; and also, that the magistrates, though requested so to do, refused to hear the complaint against him. I purpose to do this, not as a justification of the libel, by proving the truth of it; but I intend, by proof of the truth of the facts, to enable the jury to decide whether such alleged facts, being really true, the remarks on the libel are or are not within the limits of free discussion. This is a matter of a public nature, and the jury are, by the act of parliament, declared to be the judges both of law and fact. If the jury do not know whether the alleged facts are true or false, how can they say whether the remarks are within the bounds of free discussion or not? If the alleged facts are not true, the libel is most unwarrantable. If they are true, it will be hard to say that they exceed the bounds of free discussion.

1833.

REX
v.
BRIGSTOCK.

PATTERSON, J.—You have put it very ingeniously; but I cannot receive the evidence. The jury are to judge upon the examination of the libel itself.

Verdict—Guilty.

Chilton, and *E. V. Williams*, for the prosecution.

John Evans, and *Whitcombe*, for the defendant.

[Attornies—*Jones & Jefferys*, and *Tilson & Son*.]

THE defendant was afterwards sentenced to be imprisoned for six months.

1833.

HOME WINTER CIRCUIT, 1833.

BEFORE MR. JUSTICE GASELEE AND MR. BARON VAUGHAN.

MAIDSTONE ASSIZES.

BEFORE MR. JUSTICE GASELEE.

Dec. 13th.

REX *v.* JOHN BODLE the Younger.

If the counsel for a prosecution decline calling a witness whose name is on the back of the indictment, it is in the discretion of the Judge who tries the case, whether the witness shall or shall not be called, for the prisoner's counsel to examine him before the prisoner is called on for his defence.

If the witness be so called, the Judge will allow the examination of the witness to assume the shape of a cross-examination, but will not allow the prisoner's counsel to call any witnesses to contradict him.

MURDER.—The prisoner was indicted for the murder of his grandfather, George Bodle, by poisoning him.

The name of the father of the prisoner was on the back of the indictment, and he was sworn, with the other witnesses for the prosecution, to go before the grand jury; but the grand jury found the bill without calling him in and examining him.

At the close of the case for the prosecution—

Adolphus, for the prosecution, declined to call the father of the prisoner as a witness.

Clarkson, and *Bodkin*, for the prisoner, stated that the prisoner's father was the first person to prefer this charge against the prisoner. That he had been examined at great length before the coroner, who had bound him over to give evidence at the assizes; and his name was on the indictment; and he had been sworn to go before the grand jury, although he had not been called in; and they further stated, that it was of the greatest importance to the prisoner that he should be called.

GASELEE, J., (having conferred with Mr. Baron VAUGHAN).—My learned brother and myself are of opinion, that, if the counsel for a prosecution decline calling a witness whose name is on the back of the indictment, it is in the discretion of the Judge who tries the case, whether the witness shall be called for the prisoner's counsel to examine him, before the prisoner is called on for his defence; and we think, that, in this most serious case, the father of the prisoner ought to be put into the box, for the prisoner's counsel to ask him as to any thing that may be material to the prisoner's defence.

1833.

REX
v.
BODLE.

The witness was called, and the prisoner's counsel asked him a number of questions as to statements he had made at different times respecting the murder, with a view of discrediting and contradicting him, and thereby raising a suspicion that the witness might have committed the murder himself.

The prisoner's counsel then proposed to call witnesses to contradict the prisoner's father as to the different accounts he had given respecting the murder.

GASELEE, J., said, that he had allowed the examination of this witness to assume the shape of a cross-examination, because, in almost all the cases where the question had been as to putting a witness into the box whose name had been on the back of the indictment, and who had not been called by the prosecutor, the Judges had said, it was that the prisoner's counsel might have the opportunity of cross-examining him; but, as he had not been examined by the counsel for the prosecution, and had been only called at the instance of the counsel for the prisoner, the latter could not be allowed to call witnesses to contradict him.

Verdict—Not guilty.

Adolphus, and *Walsh*, for the prosecution.

Clarkson, and *Bodkin*, for the prisoner.

COURT OF KING'S BENCH.

First Sitting at Westminster in Michaelmas Term, 1833.

BEFORE MR. JUSTICE LITLEDALE.

1833.

Nov. 4th.

GODSON and Others, Executors of GODSON, *v.* RICHARDS.

A. made a promissory note, payable to B. or order. B. indorsed it, and gave it to C. to get it discounted. C. went away, and shortly afterwards came back to B. with the money. The executors of C.'s father, of whom C. was one, brought an action on the note as executors:—*Held*, that, as the executors produced the note on the trial as executors, they might recover on it, although there was no evidence that C.'s father ever had the note in his life-time.

ASSUMPSIT by the plaintiffs, as executors of the indorsee, against the defendant, as maker of a promissory note, in the following form :

“ Sept. 13, 1823.

“ Two years after date I promise to pay Mr. William Murrell or order eighty pounds, value received.

“ T. Richards.”

This note was indorsed by Mr. Murrell, who was dead, he being the son-in-law of the testator, and the defendant, an intimate friend of the family. The testator died in the month of April, 1831, and it did not appear that he had ever called for the amount of the note. Both the testator and the defendant were stated by the witnesses to be persons possessing considerable property.

It was proved by Mrs. Murrell, the widow of the indorser, that, within two or three days of the date of the note, her husband indorsed it, and it was given to her brother Edward, who was one of the present plaintiffs, to get cashed, and that he shortly afterwards returned to her husband's house with the money. She further stated, that she supposed that the money came from her father; but that her brother Edward was then thirty-six or thirty-seven years of age, and carrying on business for himself as an ironmonger.

Sir *J. Scarlett*, for the defendant.—I submit that Mr. Edward Godson cannot join with others in suing on this note, as executor of his father. He is the person who cashed the note, and he cannot be allowed to sue as an executor, and save his costs (*a*).

1833.
 GODSON
 v.
 RICHARDS.

Campbell, S. G.—He takes the note to get it cashed, and returns with the money. The note must be taken to belong to the person or persons who produce it. Suppose the plaintiff had been a stranger, would it have been any answer to an action by him, that the note had been once in the hands of Edward Godson?

Sir *J. Scarlett*.—This is not at all like the case put by the Solicitor-General. It is not like the possession of a stranger. Here, we find the note in the hands of Edward Godson, and he is one of the present plaintiffs. The note was delivered to him, and he brings back the money. If the note had been in the hands of a stranger, the reasoning would not apply. Production of a note is *prima facie* evidence of property; but, here, Edward Godson had the note in his own possession from the first, and there should be some evidence to shew that this note belonged to his father.

LITTLEDALE, J.—I do not think there is any weight in this objection. If the note had belonged to the deceased it could have been produced in no other way. It is uncertain whether Edward Godson advanced the money on his

(*a*) By the stat. 3 & 4 W. 4, c. 42, s. 31, it is enacted, "that, in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the Court in which such action is brought, or a Judge of any of the said superior Courts shall otherwise order, be liable to pay

costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff; and in all other cases in which he would be liable, if such plaintiff were suing in his own right upon a cause of action accruing to himself, and the defendant shall have judgment for such costs, and they shall be recovered in like manner."

1833.
—
GODSON
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RICHARDS.

own account or not. But, as the note is indorsed by Murrell, the holder is entitled to sue on it. The executors produce this note as executors, and I think that is sufficient.

Sir *J. Scarlett*.—I hope your Lordship will make a note of the objection?

LITLEDALE, J.—Certainly.

Mrs. Murrell stated, that the defendant gave the note for the accommodation of her husband.

The defence was, that the testator had got this note into his hands upon an understanding that the defendant was not to be called on for payment.

Verdict for the defendant.

Campbell, S. G., and *Kelly*, for the plaintiffs.

Sir *J. Scarlett*, for the defendant.

[Attornies—*Fawcner*, and *Barker*.]

Campbell afterwards obtained a rule to shew cause why there should not be a new trial, on the ground that the verdict was contrary to the evidence.

1833.

*Adjourned Sittings at Westminster, after Michaelmas
Term, 1833.*

BEFORE LORD CHIEF JUSTICE DENMAN.

CROOK *v.* JADIS, Esq.

Dec. 4th.

ASSUMPSIT by the plaintiff, as indorsee, against the defendant, as drawer of a bill of exchange for 1,000*l.*, dated May 23, 1831, drawn by the defendant on Lord Foley, and payable to the order of the drawer eleven months after date. Plea—General issue.

The only indorsement on the bill was that of the defendant.

To prove presentment, a notary's clerk stated that he presented the bill at Messrs. Drummond's, (at whose banking-house it was made payable), between six and seven o'clock in the evening, (that being after banking hours), when he was told by a person there, who usually answers the notaries' clerks on such occasions, that there were "no orders."

Sir *J. Scarlett* objected that this was not a due presentment, it being out of banking hours.

DENMAN, C. J., thought, on the authority of the case of *Garnett v. Woodcock* (a), that it was sufficient; but gave the defendant's counsel leave to move to enter a nonsuit.

If A. draw a bill of exchange, payable to his own order, which he parts with without receiving value for it, and B. obtains it on an usurious discounting of it, and after that the plaintiff give value for it, but take it under circumstances amounting to gross negligence in him, he cannot recover on it against A.; but, if the circumstances under which the plaintiff took it were only such as were calculated to excite his suspicion, but do not amount to gross negligence, this will not prevent the plaintiff from recovering.

For the defendant a witness was called, who proved that he received the bill from the defendant to get it discounted, and that he gave it to a person named Gunstan for

(a) 1 Stark. N. P. C. 475, and 6 M. & S. 44. See, also, the cases of *Morgan v. Davison*, Id. 114; *Parker v. Gordon*, 7 East, 385; and *Elford v. Teed*, 1 M. & S. 28.

1833.

CROOK
v.
JADIS.

that purpose ; but that he never received any value for it, and never gave the defendant any.

For the plaintiff, evidence in reply was given to shew that the plaintiff had discounted the bill for a person named Howard, who had bought it for 250*l.* and the cancellation of a debt of 610*l.*, due to him from a person named Pullen. It also appeared, that, when the plaintiff discounted the bill, he knew the circumstances under which it came to Mr. Howard's hands.

Sir *J. Scarlett*, for the defendant.—I submit that the purchase of this bill for 250*l.* and the debt of 610*l.* was usurious; and I also submit that the plaintiff must have known, or at least suspected, that the bill had been improperly come by; and if the plaintiff had cause so to know or suspect, he is not entitled to recover. If a person takes a lost bank-note *bond fide*, and for valuable consideration—if he takes it without due caution, he is not protected. That was held in the case of *Gill v. Cubitt* (a). So, in the case of *Downe v. Halling* (b), where a check had been lost, and the defendants, who kept a very extensive drapery-shop, received it in payment from a poor woman, who bought a trifling article, and gave her the change in money. There, though there was no *mala fides*, it was held that they were liable to the real owner of the check, because they took it under circumstances calculated fairly to excite suspicion. The buying of a bill like this is of itself suspicious. Where a person has to pay money at Leghorn or Naples, he goes into the market, and buys a bill drawn by some respectable house in this country on a respectable house at the place at which he wishes to pay the money; but that does not apply to these domestic bills, where the parties are all in this country.

DENMAN, C. J. (in summing up)—If there was gross

(a) *Ante*, Vol. 1, p. 163, 487.

(b) *Ante*, Vol. 2, p. 11.

negligence in the plaintiff when he discounted this bill, after it had been improperly obtained, that will prevent him from recovering in the present action, although he may have acted *bonâ fide*; but, it will be for you to consider, whether that appears in this case. You will also have to say, whether there was a consideration given for the bill by the plaintiff, and whether there was usury before it came to him; and, if there was, whether there was gross negligence in him at the time of his discounting the bill. If you think that the plaintiff did not give value for it, or if you think that he has given value for it, and the usury is made out, and that there was gross negligence in the discounting it, you will find a verdict for the defendant; but, if you think that that is not made out, you will find for the plaintiff.

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v.
JADIS.

Verdict for the plaintiff.

Platt, for the plaintiff, applied for a certificate for immediate execution.

R. V. Richards, for the defendant.—Sir *J. Scarlett* means to move.

DENMAN, C. J.—I shall grant a certificate for execution to issue in a fortnight, unless the defendant brings 500*l.* into Court within a week.

R. V. Richards.—Does your Lordship intend that, notwithstanding Sir *J. Scarlett's* intention of moving?

DENMAN, C. J.—Yes (*a*).

Campbell, S. G., and *Platt*, for the plaintiff.

Sir *J. Scarlett*, *R. V. Richards*, and *Steer*, for the defendant.

[Attornies—*O. T. Alger*, and *T. Gibbs*.]

(*a*) The money was paid into Court.

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JADIS.

IN the ensuing term, Sir *J. Scarlett* moved for a rule to shew cause why there should not be a nonsuit entered, or a new trial had—*First*, on the ground that the presentment was not a due presentment—and, *secondly*, that, instead of the Lord Chief Justice leaving it to the jury to say whether the plaintiff had been guilty of gross negligence, his Lordship ought to have left it to them to say, whether the plaintiff had taken the bill under such circumstances as ought to have excited his suspicion.

DENMAN, C. J.—There seems to be no objection made to the way in which I left the case to the jury, except as to the use of the words “gross negligence.” I used those words very advisedly; and I think that that is what a defendant ought to make out, and, it seems to me, that that was properly a question for the jury. With respect to the presentment, we will confer with the other Judges.

LITTLEDALE, J.—I conceive that gross negligence is the least that a defendant ought to prove.

TAUNTON, J.—I cannot form a precise estimate of what is intended to be conveyed by the words “due caution.” I think that the term “gross negligence” is quite proper.

PATTESON, J.—What is the meaning of “taking a bill under such circumstances as ought to excite suspicion?” The term “gross negligence” appears to me to be much more proper.

The Court afterwards granted a rule to shew cause why a nonsuit should not be entered on the point respecting the presentment.

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DOE on the Demise of WETHERELL v. BIRD.

Dec. 5th.

EJECTMENT to recover a house at Kensington, called Kensington House, by reason of a forfeiture of the lease, by the breach of four of the covenants contained in it.

It appeared that the house was let by a lease, dated December 5, 1802, to a person named Soilleux, for sixty-one years, and that through him the term had devolved on the defendant, who had underlet the house to Mr. Finch, who was a surgeon, and used the house as a lunatic asylum.

The first covenant alleged to be broken was a covenant to repair and uphold the premises. The second was a covenant that the lessor and his agents, &c., should enter to view the state of repair. The third was a covenant not to suffer certain businesses and trades specified, "or any other offensive trade," to be carried on upon the premises; and the fourth was a covenant not to remove or destroy fruit or other trees.

The covenant to repair and uphold was in the following terms:—

"And also, that he, the said J. N. J. S., his executors, administrators, and assigns, shall and will within the space of four years, to be computed from the said 19th day of March last, put, or cause to be put, the said messuage or tenement hereby demised, and all and singular the houses, outhouses, bakehouse, coach-house, stables, edifices, and other buildings, brick walls, pales, rails, and all and singular other the premises hereby demised, with their and every of their appurtenances, into complete and perfect order and repair, and also make, put, and restore the before-mentioned wall, windows, and window frames, suitable to the building in its original state, to the good liking of the said T. W.

"And that after the said hereby demised premises shall be so as aforesaid put into complete order and repair, and

A covenant for a landlord to be allowed to come into a house to see the state of its repair at "convenient times," is not broken by his not being allowed to go into some of the rooms, if he has given no notice of his coming.

A covenant by a lessee, that he will, during the term, repair, uphold, support, sustain, and maintain the brick walls to the demised premises belonging, is broken, if the lessee, during the term, pull down a brick wall which divides the court yard at the front of the house from another yard at the side of the house.

A covenant not to remove or grub up trees is broken by removing trees from one part of the premises to another; and so it is by taking away trees, even if the lessee plant a greater quantity than he takes away, unless those taken away were dead.

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restored and reinstated as hereinbefore mentioned, that he, the said J. N. J. S., his executors and administrators, or assigns, shall and will from time to time, and at all times thereafter during the said term hereby demised, at his and their own proper costs and charges, when, where, and as often as need or occasion shall be or require, well and sufficiently repair, uphold, support, sustain, maintain, glaze, pave, fence, scour, pale, rail, cleanse, paint, amend, preserve, and keep in repair the said messuage or tenement hereby demised, and all and singular the houses, out-houses, bakehouse, coach-house, stables, edifices, and other buildings, brick walls, gates, pales, rails, &c., and every thing else to the same messuage or tenement, hereditaments and premises belonging, or which shall belong or appertain thereto, or to any part or parcel thereof, as well ornamental as useful, in, by, and with all and all manner of needful and necessary reparations, fencings, cleanings, and amendments whatsoever."

It was opened by *Campbell*, S. G.—That Mr. Finch had taken down a wall that divided the court-yard at the front of the house from another court-yard at the side of the house; and he submitted, that it was not enough that a tenant should take down walls and put them up again before the end of the term; for that, if a tenant, under such a covenant as this, pulled down walls, it was a forfeiture of his lease, as he was bound to uphold the walls in their original state; and he cited the case of the *Corporation of London v. Venables*, which was heard before Sir John Leach, Master of the Rolls (a). With respect to the

(a) We have been favoured by the learned Solicitor-General with a sight of his manuscript note of that case, which was as follows:—
"The Corporation of London v. Venables.—(Heard before the Master of the Rolls, 30th of

October, 1833, at his private house).

"The plaintiffs were ground landlords of No. 22, Finsbury Square. The house and premises comprised a dwelling-house fronting Finsbury Square, and a stable

question as to whether the keeping a lunatic asylum was the carrying on of an offensive trade, he cited the case of *Doe d. Bish v. Keeling (a)*.

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The covenant to view was as follows:—" And further, that it shall and may be lawful to and for the said Thomas Wetherell, his heirs and assigns, and his or their agents, stewards, and surveyors, with workmen and others in his or their or every of their company, twice or oftener in every year during the said term hereby demised, at *convenient times* in the day-time, to enter and come into and upon the said messuage or tenement, hereditaments and premises hereby demised or mentioned, or intended so to be, or any part or parcel thereof, there to view, search, and see the state and condition of the same premises, and of all defects and want of reparation as upon every such view

and coach-house fronting Providence Row, and a counting-house at the back of the coach-house. The defendant, as the receiver of the police, entered into an agreement with the lessee for a lease for twenty-one years, and commenced alterations in the stable, coach-house, and counting-house, for the purpose of converting them into waiting-rooms, &c. The bill prayed an injunction to restrain the defendant from committing waste, upon the ground of the covenant for repairs being not only for repair, but for *maintaining* the buildings erected or to be erected.

"The Master of the Rolls considered it to be waste within the covenant, and decreed an injunction.

"The affidavits stated the depreciation in value of the property, occasioned by the purpose for

which these alterations were intended, namely, a police-office, and also the depreciation in value of the property No. 22, as a residence, in the opinion of the city surveyor.

"The case was argued by Mr. Bickersteth and Mr. E. J. Lloyd, for the plaintiffs; Mr. Wray, for the defendant."

(a) 1 M. & Sel. 95. In that case a lessee of a house had covenanted with the lessor "not to use or exercise, or to permit or suffer to be used or exercised, upon the demised premises or any part thereof, any trade or business whatsoever, without the licence" of the lessor. He afterwards, without licence, assigned the lease to a schoolmaster, who carried on his business in the house and premises. This was held to be a breach of the covenant.

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shall be then and there found, to give or leave notice or warning in writing, at or upon the said demised premises, or on some part thereof, to or for the lessee or his assigns to repair within three calendar months."

The covenant not to permit an offensive trade to be carried on was, that the lessee and his assigns "shall not nor will," at any time during the term, "permit or suffer any person or persons whomsoever to inhabit or dwell in or upon any part of the said hereby demised premises, who shall use or exercise therein or thereupon the trades or businesses of a butcher, baker, slaughterman, melter of tallow, tallow-chandler, tobacco-pipe maker, tobacco-pipe burner, soap-maker, sugar-baker, fell-monger, dyer, distiller, victualler, vintner, tavern-keeper, or coffee-house keeper, tanner, common brewer, or *any offensive trade*, without the special licence and consent of the said T. W., his heirs and assigns, in writing, first had and obtained for that purpose."

The covenant respecting the trees was as follows:—"And further, that the said J. N. J. S., his executors, administrators, or assigns, shall not nor will, (without the consent in writing of the said Thomas Wetherell, his heirs or assigns), remove, grub up, or destroy any fruit trees or other trees, (not being small fruit trees), growing, or which, during the said term hereby granted, may grow upon the said premises or any part thereof, but, on the contrary, shall and will use his or their best endeavours to preserve the same, and improve the growth thereof."

With respect to the breach of the covenant to view, a witness said—"I went with Mr. Wetherell to view the house; we were prevented from seeing some of the rooms: the servant said we could not see them. I do not know that Mr. Wetherell had sent any notice that he was coming."

It was proved that the house was used as a lunatic asylum, and evidence was given that the asylum was conducted in the best possible manner, but that, occasionally,

noises were heard from it. It was also proved, that, by being used as a lunatic asylum, the house would be considerably deteriorated in value. With respect to the trees, it was proved that Mr. Finch took up a good many shrubs and some cedar trees, as much as ten feet high. Some of the trees he took away entirely, but he planted the others in other parts of the premises; and it afterwards appeared that some of these trees were dead, and also, that the number of fresh trees planted was much greater than the number of old ones taken away.

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Sir *J. Scarlett*, for the defendant.—With respect to the covenant to uphold the walls, is it to be said that a person is to forfeit his lease if he pulls down a wall, so as to make a way through it? Must a man keep premises held on a long lease in so exactly the same state that he must not pull down a piggery and put up a statue in its stead? I know that, at the end of the term, he must, if it be insisted on, leave the place in the same state as he found it. The next breach of covenant on which the lessee of the plaintiff goes, is a breach of the covenant to view the premises and inspect the state of the repairs. Is it reasonable that a landlord should come to inspect the state of the repairs without giving previous notice? I submit that this covenant cannot be broken without a deliberate refusal, after a notice of the landlord's intention to come. Suppose a landlord came, as this gentleman did, without notice, and the servant who shews him over the house says, "You cannot go there, sir, my mistress is dressing;" would that be a forfeiture of the lease? With respect to the covenant which relates to the not carrying on an offensive trade, the case cited does not apply. There the covenant was that no business at all should be carried on; and it was there held that a school was a business. Here the words are "any offensive trade." A covenant for a forfeiture must be construed strictly. Is this a trade?

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Would the keeping of a lunatic asylum make a party subject to the bankrupt laws? I think not.

F. Pollock, in reply.—The covenant to keep in repair is exactly in the same terms as the covenant to leave in repair; and the party is as much bound to keep the premises in the same state, as he is to leave them so.

DENMAN, C. J., (in summing up).—The question is, whether this lease has been forfeited, by a breach of any of these covenants; for, if either of the covenants is broken, the lessor may recover the premises. These covenants contain a vast number of words, some of which have no very definite meaning. I think that the breach of covenant, in not allowing the landlord to view, is not made out. He is to view at “convenient times;” and I think that he ought to give notice that he is coming; and if he does not give notice, it is not to be considered a “convenient time,” as it cannot be expected that, where any business is carried on, they can allow the landlord to go all over the premises without they have previous notice of his coming. The next covenant, which relates to carrying on any offensive trade, is very clumsily and inartificially worded. It is, that particular businesses and trades enumerated shall not be carried on, and that the inhabitant shall not carry on any “offensive trade.” The question is, whether, as the business carried on here is not among those enumerated, it comes within the term “offensive trade?” and, upon this point, I think, notwithstanding the word “business” is omitted after the words offensive trade, that this is within the meaning of the covenant; because we must look at the object of the covenant, which is not to prevent such tradings as are within the meaning of the bankrupt laws, but to prevent such things as are likely to be an annoyance. I therefore think it within the covenant, if you think it was offensive. I think, also, that the taking

down of the wall is also a breach of the covenant respecting the upholding of the walls, unless the tenant had obtained the consent of his landlord. With regard to the removing of the trees, Mr. Finch ought to have obtained the consent of the landlord before he did that. It is impossible to say that the taking up cedars ten feet high is not a breach of the covenant, even if they were removed to another part of the premises, provided it was done without the consent of the landlord. If the trees were dead, I should say that it would be no breach of the covenant to remove them.

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Verdict for the plaintiff.—The jury found that the covenants respecting the wall and offensive trade had been broken; but that the covenant to allow the view, and that respecting the trees, had not been broken.

Campbell, F. Pollock, and Kelly, for the plaintiff.

Sir J. Scarlett, and *Steer*, for the defendant.

[Attornies—*Nind & C.*, and *Bird*.]

IN the ensuing term, *Sir J. Scarlett* moved for a rule to shew cause why there should not be a new trial, upon the ground that a lunatic asylum was not an offensive trade; and upon an affidavit as to the pulling down the wall.

The Court granted a rule to shew cause.

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Dec. 9th.

BURRELL, Bart., v. NICHOLSON.

In an action of trespass for taking goods, the defendant, without pleading the general issue, pleaded that the house of the plaintiff was "within and parcel of the parish of M.," and that he, being a constable, took the goods under a warrant of distress for parochial rates. The replication stated that the house was not "within or parcel of the parish of M." The plaintiff's counsel claimed the right to begin, as they had to prove the demand of perusal and copy of the warrant. This the defendant's counsel offered to admit:—*Held*, that the defendant had the right to begin.

TRESPASS.—The first count of the declaration stated that the defendant "broke and entered a certain dwelling-house of the said plaintiff, situate and being in the" county of Middlesex, and took his goods, and detained them for one hour. The second count was for taking the goods. There was no plea of the general issue, and the defendant had pleaded a justification, which stated that the plaintiff's house was "within and parcel of the parish of St. Margaret, Westminster;" and justified the taking of the goods as a distress for parochial rates, assessed on the plaintiff in respect of this house, as being in the parish of St. Margaret.

Replication—That the house "was not within or parcel of the said parish of St. Margaret (a)."

(a) As this form of plea and replication are not to be found in any of the printed collections, we have subjoined them:—

Plea.—And the said defendant defends the force and injury, when &c., and says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the supposed trespasses, as to the said goods, chattels, and effects, in the said first count mentioned, and the supposed trespass, as to the said goods and chattels, in the said last count mentioned, were and are one and the same supposed trespass, and not other or different trespasses. And the said defendant further saith, that the said dwelling-house, in the said first count mentioned, and in which &c., before and at the time of making the rate and assessment hereinafter mentioned, and from thence, un-

til, and at the said time when &c., in the said first count mentioned, was within and parcel of the parish of St. Margaret, in the city of Westminster, in the county of Middlesex. And the said defendant further saith, that before the said time when &c., in the said first count mentioned, to wit, on the 25th day of May, in the year of our Lord, 1830, in the county aforesaid, in and by a certain rate or assessment then and there made, assessed, allowed, and published, according to the several statutes in that case made and provided, the said plaintiff so being an inhabitant and occupier of a house and premises in the said parish of St. Margaret, (the said house being the said dwelling-house in the said first count mentioned, and in which &c.), was duly rated and assessed for and in respect of the said house and premises, for and to-

The pleadings having been opened, *Campbell*, S. G., for the defendant, claimed the right to begin, as the affirmative of the issue lay upon the defendant.

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wards the necessary relief of the poor, the repair of the highways, and the cleansing the streets, within the parishes of St. Margaret and St. John the Evangelist, in the city of Westminster aforesaid, in and for the then present year, in the sum of 42*l.*, and which said sum of 42*l.* was afterwards, and before the said time when &c., in the said first count mentioned, to wit, on the day and year last aforesaid, in the county aforesaid, lawfully demanded of the said plaintiff, and that he, the said plaintiff, then and there refused to pay the same; and the said defendant further saith, that afterwards, and before the said time when &c., in the said first count mentioned, to wit, on the 28th day of July, in the year of our Lord, 1831, in the county aforesaid, the said plaintiff had been duly summoned by and before James Ferguson, and Lawrence Williams, Esquires, (they, the said James Ferguson, and Lawrence Williams), then and there being two of his Majesty's justices of the peace in and for the said city of Westminster, in the said county, to shew cause why he refused to pay the said sum of 42*l.*, so rated and assessed as aforesaid; and the said plaintiff having then and there appeared before the said James Ferguson and Lawrence Williams, so being such justices as aforesaid, in pursuance of such summons, had admitted such demand of the said sum of 42*l.*,

rated as aforesaid, and that he had been so summoned; and the said plaintiff was then and there duly required by the said justices to pay the said sum of 42*l.*, or shew them cause why he should not pay the same; but the said plaintiff then and there refused to pay the same, and did not shew to the said justices any sufficient cause why the same should not be paid; and thereupon the said James Ferguson and Lawrence Williams, so being such justices as aforesaid, afterwards, and before the said time when &c., in the said first count mentioned, to wit, on the day and year last aforesaid, in the county aforesaid, according to the form of the statutes in such case made and provided, duly made and issued their warrant in writing, under their hands and seals, directed to John Daniel, one of the collectors of the said parish of St. Margaret, Westminster, in the county of Middlesex, and to the churchwardens and overseers of the poor of the said last-mentioned parish, and to the said defendant, (he, the said defendant, then being a constable of the said last-mentioned parish), and to all other constables and headboroughs of the said last-mentioned parish, and to each and every of them, and to all others whom the said warrant might concern, and thereby then and there required them, or some or one of them, forthwith to make distress of the goods and chattels of the said plaintiff; and if, within

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Sir J. Scarlett, for the plaintiff.—I submit that I, on the part of the plaintiff, ought to begin. This is an action for taking the plaintiff's goods; and though the question on the record is, whether the house be in this parish

the space of four days next after such distress, the said sum, together with the further sum of 5s. 6d., being the costs incurred in the premises, making in the whole the sum of 42l. 5s. 6d., together with the reasonable charges of taking and keeping the said distress, should not be paid, that then they, or some or one of them, should sell the said goods and chattels, so distrained, and out of the money arising by such sale should detain the said sum of 42l., and also the said sum of 5s. 6d., and also the reasonable charges of taking, keeping, and selling the said distress, rendering to the said plaintiff the overplus on demand; which said warrant, afterwards, and before the said time when &c., in the said first count mentioned, to wit, on the day and year last aforesaid, in the county aforesaid, was delivered to the said defendant, who then, and at the time of making the said warrant, and from thence until, and at the said time when &c., in the said first count mentioned, was a constable of the said parish of St. Margaret, Westminster, in the county of Middlesex, aforesaid, in due form of law to be executed, by virtue of which said warrant the said defendant, so being such constable as aforesaid, afterwards, to wit, at the said time, &c., in the said first count mentioned, broke and entered the said dwelling-house, in the said first count mentioned, and in which &c., and seized,

took, and distrained the said goods, chattels, and effects, in the said first and last counts respectively mentioned, then being in the said dwelling-house, as and for a distress, for the said several sums of 42l. and 5s. 6d., which were then and there respectively in arrear and unpaid, and kept and detained the said goods, chattels, and effects for the said space of time in the said first count mentioned, and until the said plaintiff paid the said several sums of 42l. and 5s. 6d., together with the reasonable charges of taking and keeping the said distress, as it was lawful for the said defendant to do for the cause aforesaid, which are the same supposed trespasses in the said declaration mentioned, and whereof the said plaintiff hath above complained against the said defendant. And this he, the said defendant, is ready to verify; wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c. (Signed) John Tidd Pratt.

Replication.—And the said plaintiff, as to the said plea of the said defendant, by him above pleaded, saith, that he, the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, the said defendant, because he saith that the said dwelling-house, in which &c. at the said

or not, yet still the plaintiff should begin, because, by the stat. 24 Geo. 2, c. 44(a), if the defendant is a constable, which this defendant is, it is imperative on the plaintiff to make a demand of a copy of the warrant, whatever the issue on the record may be; and if there has been no such demand, the plaintiff must be nonsuited.

Campbell, S. G.—I will admit the demand.

Sir *J. Scarlett*.—The other side giving the admission is just the same, in effect, as if I called a witness, as it merely dispenses with the calling of a witness; and I, therefore, ought to begin.

DENMAN, C. J.—I think that the defendant's counsel ought to begin.

Campbell, S. G., opened his case, and called witnesses for the defendant; Sir *J. Scarlett* opened the case for the plaintiff, and went into evidence; and *Campbell*, S. G., for the defendant, replied.

Verdict for the defendant.

Sir *J. Scarlett*, *Follett*, and *W. H. Watson*, for the plaintiff.

Campbell, S. G., *J. Williams*, *J. Jervis*, and *Pratt*, for the defendant.

[Attornies—*Bray, W. & B.*, and *Rogers & Son.*]

IN the ensuing Term, Sir *J. Scarlett* applied for a rule to shew cause why there should not be a new trial, on the ground that the plaintiff should have begun instead of the defendant; and also upon three other grounds.

The Court refused a rule on the point respecting the right to begin, but granted it on other grounds.

time when &c., was not within or parcel of the parish of St. Margaret, in the city of Westminster, in the county of Middlesex, in manner and form as the said defendant hath above, in his said plea in that behalf, alleged.

And this he, the said plaintiff, prays may be inquired of by the country, &c.

W. W. Follett.

(a) Set forth ante, Vol. 1, p. 41, n. (a).

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Sittings in Hilary Term at Westminster, 1834.

BEFORE MR. JUSTICE J. PARKE.

Jan. 17th.

BROWN v. WOODMAN.

There are no degrees in secondary evidence; therefore, where a defendant has given notice to the plaintiff to produce a letter, of which he kept a copy, he may, if the letter is not produced, give parol evidence of its contents, and is not bound to put in the copy; but, if there had been a duplicate original, it might be otherwise.

ASSUMPSIT for work and labour about an engraving.
Plea—General issue.

It appeared that a letter had been sent by the defendant to the plaintiff, of which the defendant had kept a copy. Notice had been given to the plaintiff to produce it, but, when called for, it was not produced.

Campbell, S. G., for the defendant, was proceeding to cross-examine one of the plaintiff's witnesses as to the contents of this letter.

Platt, for the plaintiff.—I submit, that the copy ought to be produced, as that, next to the original, is the best evidence of its contents.

PARKE, J.—There are no degrees in secondary evidence. If there had been a duplicate original it might have been different.

The witness gave evidence of the contents of the letter.

Nonsuit.

Platt, and *Tyndale*, for the plaintiff.

Campbell, S. G., for the defendant.

[Attornies—*R. Routledge*, and *J. Walls*.]

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SIMS v. TUFFS.

Jan. 17th.

TROVER for boots, shoes, and household furniture.
Plea—General issue.

It was opened by *Campbell*, S. G., for the plaintiff, that in March, 1832, the plaintiff, being a shoemaker, was fearful that his goods would be seized under some legal process, and he applied to the defendant, who was his landlord, to protect the goods. The defendant said he would do so, but that the plaintiff owed him no rent, and had his receipt for the last quarter; but that, if the plaintiff would give up that receipt, he (the defendant) would destroy it, and put in a distress for that quarter's rent. The receipt was given up, and the defendant not only put in a distress, but sold the goods, and kept the proceeds.

PARKE, J.—The parties are *in pari delicto*. I cannot assist the plaintiff in the recovery of the proceeds of this sale. They were both contemplating a fraud. The transaction must be taken as valid between these parties, though a fraud on a third person.

Evidence was given to shew that the goods were taken on a distress for rent.

PARKE, J.—I hold this distress to be a valid distress between these parties, and the plaintiff can recover nothing either for the seizure or the sale. If there were any things taken which are not in the inventory of goods taken under the distress, you may go on with the case as to them.

The defence was, that the rent was really due; but, it being at first supposed that four pairs of boots and seven or eight pairs of shoes had been sold by the defendant,

If A., the tenant of B., has paid all his rent, and got his landlord's receipt for it, but, fearing that his goods will be taken on legal process, agree with his landlord to destroy the receipt, and that the latter shall put in a distress for rent to protect the goods, and the landlord do so, and sell the goods, and keep the proceeds:—This distress is good as between A. and B, though void as against a third person, and A. can maintain no action against B. for it. But, if B. sold some articles not included in the inventory of the distress, A. may maintain an action in respect of these articles.

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which were not in the inventory, the case was proceeded with; but, it appearing afterwards that they were not, the plaintiff was—

Nonsuited.

Campbell, S. G., and Mansell, for the plaintiff.

Law, and Platt, for the defendant.

[Attornies—*Fowler, and Isaacs.*]

In the case of *De Metton v. De Metton*, 2 Camp. 420, and 12 East, 234, a Frenchman, domiciled at Lisbon, had consigned a cargo, which was his property, to Nantes, under the name of a native Portuguese, who acted as *neutraliser*; the ship was taken and brought into an English port, and the cargo libelled in the Admiralty. The Portuguese, with the privity of the Frenchman, claimed it, and it was

decreed to be delivered up to him as neutral property:—*Held*, that an action at law could not afterwards be maintained by the Frenchman against the Portuguese to recover the proceeds of the cargo, on the ground that a person who had procured an adjudication to another person could not be permitted afterwards to claim the same property as belonging to himself.

DOE on the Demise of MARRIOTT v. EDWARDS.

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If, on the trial of an ejectment, it appear that the parish is misstated in the declaration, the Judge will allow it to be amended under the stat. 3 & 4 W. 4, c. 42, although the ejectment be for a forfeiture.

If a lessor, who has only an equitable title, grants a lease, he has, as against

his lessee, a good title by estoppel; but if, after the lease, the lessor, by a mortgage deed grant all his interest in law and in equity to a mortgagee, the lessee may give in evidence this deed, and thus prevent the lessor from recovering in ejectment on a forfeiture of the lease.

EJECTMENT to recover premises at Knightsbridge.
Plea—General issue.

The lessor of the plaintiff had granted a lease of the property to a person named Greenacre, and in it the latter covenanted, *inter alia*, to build houses on the premises, which he had not done, and this ejectment was brought for a forfeiture. The lease was executed on the 6th of September, 1831, and was for ninety-three years.

In the declaration the property was stated to be “in the *parish* of St. Margaret and St. John, Westminster.”

Barstow suggested that the parish was "St. Margaret."

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PARKE, J.—If the allegation had been that it was in the parishes of St. Margaret and St. John, proof that it was in St. Margaret would have done, so as to enable the lessor of the plaintiff to recover property in St. Margaret.

Gale, for the plaintiff.—Part may be in one parish and part in another.

PARKE, J.—If the word used had been parishes, that might have been so.

Gale, for the plaintiff, asked for leave to amend under the stat. 3 & 4 W. 4, c. 42.

PARKE, J.—If the defendant was not misled I shall allow the amendment.

Barstow.—It is for a forfeiture.

PARKE, J.—That makes no difference.

Barstow.—Ought they not to pay some costs for this amendment?

PARKE, J.—If you have brought witnesses, or have been at any expense to prove that this was the parish of St. Margaret, I shall allow those costs.

Barstow.—We have not brought witnesses, but we have depended on this point.

PARKE, J.—I shall consider whether I shall impose the terms of paying costs; but people must not now expect that amendments will not be made.

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Barstow, for the defendant, opened, that he should shew that the lessor of the plaintiff had parted with all his interest in the premises after he had granted the lease to Greenacre.

PARKE, J.—That satisfies me that the amendment should be without costs. It is quite clear that your real defence was not the parish.

For the defendant, a conveyance, executed on the 17th February, 1832, between the lessor of the plaintiff on the one part, and Eliza Mary Elliott and Ann Catherine Elliott of the other part, was put in.

In this conveyance it was recited, that “Whereas the said S. W. Marriott is now sufficiently entitled to the hereditaments secondly hereinafter particularly mentioned, [the premises in question], and intended to be hereby granted and released, for an estate of inheritance in fee simple in possession, subject to a mortgage thereon for securing the sum of 10,000*l.* and interest, but free from all other incumbrances.”

It then recited that this conveyance was to secure a sum of 1100*l.*; and by it the lessor of the plaintiff granted to Eliza Mary Elliott and Ann Catherine Elliott, “all estate, right, title, interest, inheritance, use, trust, possession, property, claim, and demand whatsoever, both at law and in equity, to the said E. M. E. and A. C. E., their heirs and assigns, for ever, subject to the proviso of redemption hereinafter contained.”

PARKE, J.—This conveyance passes all interest both at law and in equity out of the lessor of the plaintiff.

Gale, for the plaintiff.—I submit, that a tenant cannot set up a mortgagee’s title.

PARKE, J.—You granted a lease when you had only

equitable interest; but you had then a good title as against the lessor by estoppel, but now, by this conveyance, you have parted with all your interest both at law and in equity, and the plaintiff must be called.

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Nonsuit.

Gale, for the plaintiff.

Barstow, for the defendant.

[Attornies—*E. Kemp*, and *Eaton*.]

ON a subsequent day, *Gale* moved for a rule to shew cause why there should not be a new trial, on the ground that a tenant could not set up against his landlord a title of a mortgagee, who had not interfered with the possession. He admitted that a tenant might shew that his landlord's title had expired. However, in the case of *Doe dem. Bristow v. Pegge* (a), Mr. Justice Buller says, that the tenant cannot "set up the title of the mortgagee against the mortgagor, because he holds under the mortgagor, and has admitted his title." So, the case of *Doe dem. Whittaker v. Hales* (b) shews, that a mortgagee may recognise a legal title in the mortgagor; and that case is not overruled by the case of *Doe dem. Rogers v. Cadwallader* (c); but decides, that a receipt of interest was not alone a recognition of a lawful possession. This mortgage could do no injury to the tenant, as by a proviso in the stat. 4 & 5 Anne, c. 16, no tenant is to be prejudiced by payment of rent to a grantor, where a grant of a reversion is made before notice shall be given to him of the grant by the grantee. In the case of *Balls v. Westwood* (d), which was an action for use and occupation, the landlord, who was a copyholder, had forfeited his estate; and the tenant contended, that he was

(a) 1 T. R. 760, n.

(b) 7 Bing. 322.

(c) 2 B. & Ad. 473.

(d) 2 Camp. 11.

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not liable to pay rent to the landlord after the forfeiture, but Lord Ellenborough held that he could not make this defence. Another difficulty would arise as to who should distrain for the rent, the landlord or the mortgagee, and great inconvenience would arise in the county of Middlesex, as tenants could always (as the defendant had done) search the registry, and find out the mortgages.

The Court took time to confer with Mr. Justice J. PARKE; and on a subsequent day, DENMAN, C. J., said—“We agree with my brother PARKE, that, after this assignment, the landlord cannot maintain an ejectment for this forfeiture.”

Rule refused.

Jan. 20th.

ALDENBURGH v. PEAPLE.

If a tenant from year to year give a notice to quit, not expiring with the year, the landlord, if the notice be in writing, and signed by the tenant, may, if he pleases, treat this irregular notice as a surrender of the tenancy.

A landlord cannot justify making a distress for rent after dark.

TRESPASS for taking the plaintiff's goods, with a count for an expulsion. Plea—General issue.

It appeared that the plaintiff rented a house at Pentonville of the defendant, as tenant from year to year; and that, at about 11 o'clock on the night of the 13th of July, 1833, the defendant, seeing the plaintiff's son go into the house and leave the key in the door, took possession of the key, and kept the plaintiff out of the house, alleging that he took the goods as a distress for rent. The plaintiff had, in the month of March, 1833, sent the defendant a written notice to quit, signed by her, but that notice did not expire with the year of the tenancy, and had not been acted on by the defendant.

PARKE, J., (in summing up).—The landlord might, if he had chosen, have treated this irregular notice to quit as a surrender, as a term of this kind may be surrendered by a

note in writing (a); but he has not done so. With respect to the taking of the goods, that cannot be justified as for a distress, because no one has a right to make a distress after dark.

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Verdict for the plaintiff—Damages 50*l*.

Sir *J. Scarlett*, and *Hutchinson*, for the plaintiff.

Kelly, and *Turner*, for the defendant.

[Attornies—*H. W. Hall*, and *Coe & Co.*]

(a) By the stat. 29 Car. 2, c. 3, s. 3, it is enacted, that “no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, grant-

ed, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents, thereunto lawfully authorized by writing or by act and operation of law.” See ante, p. 68, n.

CHILD v. CHAMBERLAIN and Six Others.

Jan. 20*th*.

CASE.—The *first* count of the declaration was in trover; the *second* count was for an excessive distress; the *third* count was on the statute of Westminster 2, 13 Edw. 1, c. 37, for taking a distress “by other persons than bailiffs sworn and known to the liege subjects of this realm, that is to say, by persons wholly unsworn and unknown to the liege subjects of this realm;” the *fourth* and *fifth* counts were for not giving due notice of the distress; the *sixth*, for not giving a copy of the charges of the distress;

Where in tort there are several defendants, if there be, at the close of the case for the plaintiff, no evidence against some of the defendants, the Judges have resolved that those defendants against whom there is no evidence shall be immediately acquitted, and

that their acquittal shall not be delayed till the case of the other defendants is gone into.

In actions for irregular distresses, the correct practice is to make either the landlord alone, or the landlord and the broker defendants, and not to join appraisers, &c.; and if a plaintiff do join them, the Judge will oblige him to make out his case by strict rule, and not allow questions to be put to a witness who has been cross-examined, or a witness to be called back, with a view of fixing such appraisers, &c.

The stat. Westminster 2, c. 37, which requires distresses to be made by brokers sworn and known, does not extend to distresses for rent.

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the *seventh*, for not removing the goods within a reasonable time after the five days; the *eighth*, for not selling the goods within a reasonable time after the five days; the *ninth*, for taking unreasonable charges for the taking of the distress; the *tenth*, for taking more than 4*d.* for impounding the distress. Plea—General issue.

The taking of the goods was proved; but, there being no evidence adduced on the part of the plaintiff to affect several of the defendants, a witness named Wood was called on the part of the plaintiff, and had been cross-examined.

Dunbar, for the plaintiff, wished his Lordship to ask him whether he saw a defendant named Gardiner at the time of the distress.

PARKE, J.—You have joined persons to the number of seven in this action; in short, every one who was on the premises. The fair way is to bring the action against the landlord, or, at most, against the landlord and the broker only, and not to include the appraisers or the man in possession; and if you do so, you must make out your case according to strict rule.

The question was not put.

Dunbar.—Will your Lordship allow me to call back the first witness, to put the question to him?

PARKE, J.—These persons are only made defendants, to prevent them from being witnesses. I think I ought not to do it.

At the close of the plaintiff's case, *Adolphus*, for the defendants, asked to have those defendants against whom there was no evidence acquitted.

PARKE, J.—It has been settled by the unanimous opinion of the Judges, that, if there is no evidence against any one defendant, at the conclusion of the case on the part of the plaintiff, such defendant is to be acquitted; so that all defendants not fixed by the plaintiff's evidence are to be acquitted before any part of the defence is gone into. This was the unanimous opinion of all the Judges; before that, there was a discrepancy in the practice.

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Dunbar, for the plaintiff, cited the case of *Cowles v. Dunbar (a)*.

PARKE, J.—That was before the resolution of the Judges.

Three of the defendants, against whom there was no evidence, were acquitted.

PARKE, J.—There is no evidence to shew that the distress was excessive.

Dunbar.—There is no evidence that any rent was due.

PARKE, J.—If a tenant holds of a landlord, it lies on him to shew payment, there being no evidence of what amount was due. How can we say that the distress is excessive? The third count is for appraising by unsworn brokers, under the stat. Westminster 2. I never saw a count framed on that statute. [His Lordship read the clause (b)]. I am of opinion that that enactment does not apply to a bailiff on a distress for rent. It does not affect distresses for rent.

(a) Ante, Vol. 2, p. 565.

(b) By the stat. of Westminster 2, c. 37, which recites, that "bailiffs, to whose office it belongeth to take distresses, intending to grieve their inferiors, that they

may extort money from them, do send strangers to take distresses;" it is enacted, that "no distress shall be taken but by bailiffs sworn and known."

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Mansel.—Does it not come within the equity of the statute?

PARKE, J.—No. It is quite evident that the plaintiff knew that Mr. Chamberlain was his landlord, and that the defendant, Bond, was his broker.

Evidence for the defence was gone into.

Verdict for all the defendants.

Dunbar, and *Mansel*, for the plaintiff.

Adolphus, and *Clarkson*, for the defendants.

[Attornies—*Warren*, and *Chamberlain*.]

Dunbar afterwards moved for a rule to shew cause why there should not be a new trial; but the Court refused a rule.

Jan. 22nd.

CRABB v. KILLICK and Others.

In an action for an irregular distress, the only evidence at all affecting K., the landlord, was, that all the defendants appeared by the same attorney, and that the defendant's attorney had given the plaintiff notice to produce "the notice of distress for rent due to Mr. K.;" and that the

CASE.—The *first* count was for removing goods distrained without notice; the *second* count was for an excessive distress; and the *third* was a count in trover.

The defendants all appeared by the same attorney; but the only evidence to connect Mr. Killick with the distress was, that the managing clerk of the defendant's attorney had served the plaintiff's attorney with a notice to produce, signed by the defendant's attorney, which called on the plaintiff to produce a "notice of distress for rent due to Mr. Killick;" and at the same time the managing clerk

managing clerk of the defendant's attorney, when he served it, had offered 10*l.* to settle the action:—*Held*, that this was not evidence to go to the jury as against K.; and the Judge therefore directed the acquittal of K.

of the defendant's attorney offered to pay 10*l.* and the costs, to settle the action.

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PARKE, J.—There is no evidence against the defendant Killick.

Mansel, for the plaintiff.—I submit that the notice given by the attorney who acted for all the defendants, and the offer of compensation, are evidence to go to the jury.

PARKE, J.—Oh, no.

His Lordship directed the acquittal of Mr. Killick, and the other defendants were acquitted on the merits, after the defence had been gone into.

Mansel, for the plaintiff.

Cleasby, for the defendants.

[Attornies—*W. Marner*, and *Brundrett & Co.*]

BENT v. BENYON.

Jan. 24th.

TROVER. Plea—Non assumpsit. The jury were sworn.

PARKE, J.—The declaration is in trover; and the plea is, that the defendant “did not undertake and promise in manner and form as the said plaintiff hath above thereof complained against him.” It is no issue.

Mansel, for the defendant.—As there is no issue, we cannot call the plaintiff. There must be a re-pleader.

PARKE, J.—If you will consent on both sides to an

If, after the jury are sworn, it be discovered, that, to a declaration in trover, the defendant has pleaded non assumpsit, the Judge will discharge the jury, unless both parties consent to an amendment.

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amendment, the jury may be re-sworn; if not, they must be discharged.

Mansel.—There must be judgment *quod replacitent*.

PARKE, J.—The jury must be discharged.

Jury discharged.

D. Pollock, and *Swann*, for the plaintiff.

Mansel, for the defendant.

[Attornies—*Pollock & H.*, and *Person*.]

COURT OF COMMON PLEAS.

First Sitting in London, in Michaelmas Term, 1833.

BEFORE MR. JUSTICE PARK.

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Nov. 15th.

MENDIZABAL v. MACHADO.

A. being arrested by the indorsee of some foreign bills of exchange drawn upon him, and which he had previously refused to accept, said that he would have accepted them when presented, but he had not

ASSUMPSIT on thirty-seven foreign bills of exchange, drawn by one Gandiola on the defendant, and indorsed to the plaintiff. They were stated, in some counts, to have been accepted by the defendant, payable at sight; and, in others, the acceptance was differently stated. There were also the money counts. Plea—The general issue.

the funds from France; and that, when he had got the funds he would have paid them, but for some expressions of the indorsee, which he thought reflected on his honour; adding, that he had told the clerk of the indorsee that when he got the funds over from France, the bills should be paid.—*Held*, that this amounted to an acceptance by the defendant, and the funds having been received by him, that he was bound to pay the bills.

It appeared, that, in the year 1822, a treaty was entered into between the respective governments of France and Spain, under which a large sum of money, more than sufficient to discharge the bills in question, was transferred to the defendant, who was the Spanish consul-general at Paris. Shortly after this, the Spanish constitutional government, being in want of money, the plaintiff was applied to by Gandiola, who was then Spanish minister of finance, and he agreed to advance money for the use of the government, on the security of the fund which was in the hands of the defendant. In consequence of this, Gandiola, by direction of the King, with the authority of the Cortez, drew the bills in question on the defendant. This was in the year 1822. Notice was given to the defendant, who refused to accept the bills, in consequence of which they were protested for want of acceptance. In the month of May, 1825, the defendant, being in this country, was arrested by the plaintiff, upon which occasion, when he was in custody, he, in conversation with an English merchant, said, that, if he had been in possession of the means of paying them, he would have accepted the bills when they were presented, but that he had not then been able to get the funds over from France; and that, when he did get them, he would have paid the bills but for some expressions of the plaintiff, which he thought reflected on his honour. He added, that he had told the plaintiff's clerk, that when he came into possession of the funds, or got them over from France, the bills should be paid. The witness, who proved these admissions, said, on his cross-examination, that the defendant did not mention that he had had any countermand from Spain, after the destruction of the constitutional government, nor did he allude to the altered state of affairs in Spain, as any reason for not paying the bills.

Wilde, Serjt., for the plaintiff, contended, that the facts proved amounted to a sufficient acceptance on the part of

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the defendant, or to an equitable assignment, sustaining the promise to pay. He referred to *Pearson v. Dunlop* (a), *Smith v. Abbott* (b), *Julian v. Shoberl* (c), and *Miln v. Prest* (d), as authorities which, in principle, were distinctly in point.

(a) Cowp. 571.—“If the indorsee of a bill of exchange, who has received a navy bill, assigned to the drawee as a security to him (the indorsee) till the bill of exchange is accepted, deposit such navy bill with the drawee, and the drawee receives the money upon it, he is answerable for the amount in an action for money had and received to the use of the indorsee, though he may have done nothing that amounts to an acceptance of the bill of exchange. If the drawee of a bill of exchange says he cannot accept it till stores are paid for, it is an undertaking to accept when the stores are paid for.”

(b) 2 Strange, 1152.—“The defendant accepted a bill of exchange, to pay it when goods, consigned to him, and for which the bill was given, were sold; and the plaintiff counted upon the custom of merchants. After a verdict for the plaintiff, it was moved, in arrest of judgment, that this acceptance, depending upon the contingency of the sale of the goods, was not within the custom of merchants, or negotiable. But the Court, upon consideration, held it good. For, though the plaintiff might have refused to take such an acceptance, and have protested the bill, yet nobody can say he might not

submit to it. And it will affect trade, if factors are not allowed to use this caution, when bills are drawn, before they have an opportunity to dispose of the goods. A man who is drawn upon to pay at ten days' sight may accept for thirty; Molloy, 304; though the other might protest the bill.” Salk. 129; Comb. 452.

(c) 2 Wils. 9. In that case, the acceptance was conditional; viz. “upon account of the ship Thetis, when in cash, for the said vessel's cargo,” and it was held a good acceptance.

(d) 4 Camp. 393. In that case, the defendant, who was the drawee of a bill of exchange, drawn on account of a cargo of wheat, consigned to him, said, when the bill was presented to him for acceptance, “it will not be accepted until the ship with the wheat arrives.” And Gibbs, C. J., said, that, if the jury were of opinion that the statement, according to the use of language in commercial dealings, imported a promise to accept the bill on the arrival of the cargo, he was of opinion, that, the cargo having arrived, the defendant was liable as acceptor. This case is also reported in Holt's N.P.C. 181, which see, and the cases there referred to in a note.

Kelly, for the defendant.—The defendant is a mere stakeholder. He does not deny the receipt of the money. He has no personal claim to it, and wishes to pay it to such person as the law says is entitled to receive it. It is admitted that the constitutional government exercised all the powers of the state, though the King himself afterwards, and the succeeding government also, said that the King had been forced into his measures by the Cortez. But it was a serious breach of faith, on the part of the Spanish government, to appropriate to the plaintiff's claim that money which was given by the French government for the advantage of those Spanish subjects who had been injured. When the constitutional government was destroyed, the King and the new government abrogated the acts of the constitutional government, and required the defendant to give up the money to them. The question is this: Upon the facts proved, has the plaintiff shewn that the defendant did what in law amounts to an acceptance of the bills? Does the declaration amount, under all the circumstances, to an acceptance in point of law? If they had been inland bills, the acceptance must have been in writing. There are, certainly, authorities which go to shew that a conditional acceptance is binding.

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PARK, J., (in summing up), said:—The defendant was no party to the conduct of the government of Spain, in what was said to be a misappropriation of the money. The questions are, *first*, Whether there was a conditional acceptance? and, if so, has the condition been performed? If my opinion is wrong, it may be set right by the Court; but I have no doubt that what the defendant told the witness he had said to the plaintiff's clerk amounted to an acceptance, viz. that when he got the funds from France the bills should be paid. Then, did the funds come from France? That has been admitted; and, if so, then the defendant is bound to pay. The cases cited seem to me to be applicable. Upon those authorities, I, as a Judge,

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have no difficulty in saying, in point of law, that it does amount to an acceptance of these bills. I am bound to tell you, that, if you believe the evidence, there was a conditional acceptance, and the condition has been performed; and, in that case, the plaintiff is entitled to recover.

Verdict for the plaintiff—Damages 140,000*l*.

Wilde, and *Bompas*, Serjts., and *Hil*, for the plaintiff.

Kelly, *Gunning*, and *Chandless*, for the defendant.

[Attornies—*Freeman & B.*, and *T. & G. Selby*.]

IN the course of the Term (*a*), *Jones*, Serjt., moved to set aside the verdict; but the Court said, that the facts proved amounted to an acceptance of the bills, and, therefore,

Refused a rule.

(*a*) The Court said, that Sunday was not to be considered as one of the four days within which a motion for a new trial must be made.

Second Sitting in London, Michaelmas Term, 1833.

BEFORE MR. JUSTICE PARK.

Nov. 22nd.

DAVISON v. OVEREND.

A warrant of attorney is then only an answer to an action for money secured by it when judgment has been entered up on it.

ASSUMPSIT for money paid, &c. Plea—Nonassumpsit.

On the part of the plaintiff, the payment by him of sums of money, amounting together to 305*l*. 19*s*. 5*d*., to the Secondary of London, to relieve two attachments against the defendant, was proved.

On the part of the defendant, the particulars of the plaintiff's demand delivered in the cause were put in, which commenced as follows:—"This action is brought to recover the sum of 292*l.* 13*s.*, the balance of a written account, which was stated and settled between the plaintiff and defendant on the 10th of May, 1829, and signed by the defendant, and which account is as follows"—.

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Butt, for the defendant, submitted that the plaintiff ought to prove the stating and settling of the account.

PARK, J., said he thought it had better be produced.

Taddy, Serjt., for the plaintiff, assented, and called a witness who proved that he was present when the account was stated, and that the defendant was apprized of the nature of the different items. The account was then produced. It was on the back of a parchment, which purported to be a deed between the plaintiff and defendant, assigning eight houses as a security. It was signed and sealed by both parties, but it was not stamped; nor was there any attesting witness to its execution. There was a recital that the defendant stood indebted to the plaintiff for costs and money lent, &c., which recital proceeded thus:—"An account thereof respectively is described on the back of the first skin hereof, and which account the said William Overend admits to be correct." There were other recitals, stating that it had been proposed that Overend should execute the deed, together with a warrant of attorney; and that he had executed a warrant of attorney bearing even date with the deed. There was an indorsement on the deed signed by the plaintiff, and dated May 30th, 1829, agreeing that judgment should not be entered up on the warrant of attorney till the 12th of August. The witness who was present at the statement of the account proved the execution by the defendant of the warrant of attorney, and stated that there was

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a sum of 35*l.* mentioned in the account, but he could not recollect whether that sum included a charge for a stamp for the deed. A partner in the house of Farebrother & Co., surveyors and auctioneers, was called on the part of the plaintiff, to prove that the houses mentioned in the deed had been previously mortgaged to more than their value. He stated it as his opinion, that they would not sell at all, as there were gas works in front and a manufacturing chemist's behind.

Butt, for the defendant.—The simple contract debt is merged in the higher securities. It is a harass to bring an action where a party has a judgment on a warrant of attorney. Mr. Baron Bayley says (*a*), that where judgment is not entered up, a warrant of attorney is no answer; but where it has been entered up, it is an answer to an action. As to the deed, it does not lie in the plaintiff's mouth to deny it, as he was bound to have the stamp affixed. The covenant is binding as far as he is concerned, as he might have got the stamp affixed at any time, and have sued on the deed.

A witness produced an examined copy of the judgment entered up on the warrant of attorney, dated 26th October, 1829. He stated, that he had compared it with the judgment roll; and added, that he saw the roll, but that, at the examination, the officer read it to him (*b*).

Taddy, Serjt., for the plaintiff, objected that the judgment could not be given in evidence under the general issue.

Butt.—In this form of action, which is *assumpsit*, judgment recovered may be *proved*, without its being specially pleaded (*c*).

(*a*) MS. Exchequer, 1831.

(*b*) See the case of *Fyson v. Kemp*, ante, p. 71, and the cases referred to in a note to that case.

(*c*) A judgment is evidence un-

der the general issue in *assumpsit*, but it is not *conclusive* unless it is pleaded. See *Stafford v. Clark*, ante, Vol. 1, p. 403, and the authorities there cited.

PARK, J.—I shall receive the evidence certainly. My practice is, whenever I can, rather to receive evidence than to reject it, because it is less mischievous.

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The examined copy of the judgment having been read—

PARK, J., said—I shall nonsuit the plaintiff, and give my brother *Taddy* leave to move to enter a verdict for the 29*th* 13*s*.

Nonsuit, with leave, &c. (a).

Taddy, Serjt., and *Thesiger*, for the plaintiff.

Butt, for the defendant.

[Attornies—*W. Davison*, and *Hall & B.*]

(a) No motion was made.

Adjourned Sittings at Westminster after Michaelmas Term, 1833.

BEFORE LORD CHIEF JUSTICE TINDAL.

POSTMAN v. HARRELL and Others.

Dec. 6*th*.

TRESPASS for breaking a door and a gate, and also for taking away a mangle and other goods of the plaintiff. Plea—The general issue.

The plaintiff was a female, who, at the time of the trespass, which was on the 1*st* of April, 1833, was tenant of a house in Grove Mews, at Paddington. The house was but just taken, and it appeared, that, up to that time and for three months previous, she had lived with a person named Varrier, in a house in Lisson-street, Lisson Grove, less than a quarter of a mile from Grove Mews. The defen-

In trespass for taking goods under a distress for rent, if they have been clandestinely removed, and are afterwards seized, the defence must be pleaded specially, as the statute 11 Geo. 2, c. 19, s. 21, does not apply to such a case.

A landlord has no right to follow, and take un-

der a distress for rent, the goods of a lodger which have been taken off the premises, but only those of his own immediate tenant.

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dant Harrell was Varrier's landlord, and the other defendants his wife and a broker. The mangle and other articles seized had been removed from the house in Lisson-street, to that in Grove Mews, on the morning of the day on which the trespass was committed. The plaintiff's witnesses proved that she carried on the business of a laundress, and purchased the mangle as Mrs. Postman, and that they knew her by the name of Postman, though they admitted that they had heard her called by the name of Varrier. Rent was due from Varrier at the time of the trespass. It appeared that the defendants went to the house in Lisson-street, with the intention of making a distress, but, finding the goods removed, followed immediately, without having done so.

Taddy Serjt., for the defendants, was contending that they were justified in following the goods which had been removed from Varrier's house, when—

Wilde, Serjt., observed, that there was no justification pleaded, and therefore the facts relied on could not be given in evidence.

Taddy, Serjt., submitted that the stat. 11 Geo. 2, c. 19, s. 21, made them evidence under the general issue.

TINDAL, C. J.—It has been ruled that the statute does not apply to goods fraudulently removed. It only relates to distresses made upon the premises in respect of which the rent is due.

Wilde, Serjt., referred to *Fourneauz v. Fotherby* (a) as the authority on the point.

(a) 4 Camp. 136. According to that case, and also *Vaughan v. Davis*, 1 Esp. 256, although in trespass for taking goods under a distress for rent, the defendant may give his justification in evi-

Taddy, Serjt., was then proceeding to contend, that the goods of the plaintiff, supposing her an unmarried woman, being in the house of Varrier, would have been liable to the distress for rent, and therefore were liable to be followed.

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TINDAL, C. J.—Just look at the case of *Faulkner v. Adams*, in 5 M. & S. 38; there the Court of King's Bench held that the statute authorizing a landlord to follow goods taken off the premises applies only to the goods of the tenant, and not to those of a stranger.

On the part of the defendants, two witnesses were called who lodged in the house in Lisson-street, and according to them the plaintiff and Varrier lived together as man and wife, and she used to speak of Varrier as her husband.

Taddy, Serjt., then submitted, that, as the plaintiff treated Varrier as her husband, she must be taken by the jury to have been his wife, and, if so, she could not maintain the action.

TINDAL, C. J.—The only question in this case is, whether upon the evidence you have heard, you are of opinion, that, at the time of the trespass, Mrs. Postman was married to Varrier; for if she was, then he ought to bring the action, and not she? A marriage may be made out not only by shewing the actual marriage, but also by cohabitation, and by the parties treating each other as man and wife. This last evidence will be more or less strong according to length of time and circumstances. It seems that the plaintiff and Varrier had been living together in another place before they came to the house in Lisson-street. The

dence under the general issue, by stat. 11 Geo. 2, c. 19, s. 21, yet where the goods have been clandestinely removed from the pre-

mises, and afterwards seized by the defendant, the defence must be specially pleaded.

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plaintiff's witnesses say, that, up to the time of the diatress, she was known as Mrs. Postman. For the defendants, two witnesses say, that she spoke of Varrier as her husband; and that they were living together in a way which would be improper if they were not married, there can be but little doubt. It is clear that she went by both names, and the question will be, whether that satisfies you that there was an actual marriage between them?

Verdict for the plaintiff—Damages 20*l*.

Wilde, Serjt., and *Wordsworth*, for the plaintiff.

Taddy, and *Andrews*, Serjts., for the defendants.

[Attornies—*Flower & Holt*, and *Baster*.]

WHITFORD v. TUTIN and Others.

In assumpsit against several defendants, a statement made by one is receivable in evidence, as the plaintiff may proceed by steps to fix each of the defendants separately.

Proof of the possession by a member of a committee of books, which he has in his custody, not as such member, but as tenant of the premises previously occupied by such committee, is not sufficient, in an action against other members of the committee, to let in parol evidence of the contents on notice and non-production.

ASSUMPSIT for salary, as secretary of a society called "The British and Foreign Seamen and Soldiers' Friend Society," against the defendants, as members of the committee of management. Plea—Non assumpsit.

To prove that plaintiff was appointed secretary, and the rate at which he was to be paid, Joseph Mead (a former secretary of the society) was called, who proved that the plaintiff was appointed at a public meeting at which the defendants were present, by a resolution of the meeting, which resolution was in writing, and was entered in the minute book of the society. The witness was then asked what salary plaintiff was to receive?

Upon this it was objected by *Wilde*, Serjt., and *Mellor*, for the defendants, that the resolution being in writing must be produced, and that parol evidence of the terms of the appointment was inadmissible.

Bompas, Serjt., for the plaintiff, then called upon the defendants' counsel to produce the minute book, in pursuance of the notice which had been given. The book was not produced. He then urged that the fact of the resolution being reduced to writing did not exclude parol evidence. But—

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TINDAL, C. J., was of opinion that such evidence could not be given; he, however, told the plaintiff's counsel that they were at liberty to give in evidence any independent admissions by the defendants, individually, on the subject.

The witness then went on to state, that, at the meeting at which the plaintiff was appointed, but *before* his appointment, there was a conversation respecting his salary. Backler, one of the defendants, was present.

Wilde, Serjt., objected, that what was said was not evidence affecting the defendants; moreover, that the conversation was preparatory to the resolution; and that the resolution alone must be taken to be the organ.

TINDAL, C. J., admitted the evidence as affecting Backler; and said, they might proceed by steps to fix all the defendants if they could.

Subsequently, a witness named Coleman was called on the part of the plaintiff, who stated that he was a member of the committee in question until it broke up at Michaelmas, 1832; and that the books and papers of the society were always kept at the office of the society, and that they remained there until Christmas in the same year, when they were delivered to him, the witness; but that he was at that time a member of another society, which then occupied the office. He further stated, that he had no doubt that the minute book was amongst the papers and books in his custody, although he had never looked for it, nor had he communicated the fact of their being in his possession to the defendants.

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Bompas, Serjt., then urged that as Coleman was a member of the committee with the defendants, he had a joint interest with them in the books; and that as they were removed from the office of the society in question to his care, he must be considered to be so connected with the defendants, that notice to them to produce, and non-production by them, were sufficient to let in parol evidence of the terms of the appointment of the plaintiff.

TINDAL, C. J.—I am clearly of opinion, that the circumstances are not sufficient to let in the evidence; for, Coleman does not hold the books now as a member of the committee in question, but is in a new character, and a member of a new society; therefore, if you have no other evidence, the plaintiff must be called.

Nonsuit.

Bompas, Serjt., and *Mahon*, for the plaintiff.

Wilde, Serjt., and *Mellor*, for the defendants.

[Attornies—*J. Dobie*, and *G. Clark*.]

Adjourned Sittings in London, after Michaelmas Term,
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BEFORE LORD CHIEF JUSTICE TINDAL.

Dec. 13th.

BONSOR v. ELEMENT.

The Judge in an undefended cause, where the plaintiff could not get on for want of a written agreement, discharged the jury, and allowed the record to be withdrawn, in order to save expense to the parties.

ASSUMPSIT for goods sold and delivered. The cause was undefended.

A witness for the plaintiff proved, that when, upon some dispute in relation to the goods in question, which were machines for weaving, the parties went before a ma-

gistrate, the defendant stated that he had bought the machines for 36*l.*, and had paid part of the money; but the witness added, that there was a written agreement between the parties upon the subject.

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This agreement not being in Court—

TINDAL, C. J.—The plaintiff should produce this agreement, and, if he does not, he must be called. It is true that the defendant admitted, when he was before the magistrate, that he had bought the machines, and that the price was 36*l.*, of which he had paid part. But that does not enable the plaintiff to proceed as for goods sold, without producing the agreement. It leaves it open as to the terms of the agreement, which may be conditional, or it may be to pay by instalments.

The plaintiff was about to be nonsuited, when *Steer* suggested, that, perhaps, under the circumstances, his Lordship would allow the record to be withdrawn, as it was a surprise upon the plaintiff.

TINDAL, C. J. assented; and told the jury that they were discharged from giving a verdict; adding, that he adopted that course to save expense to the parties.

Jury discharged, and record withdrawn.

Steer for the plaintiff.

[Attornies—*Flower & H.*, and *Brutton & Co.*]

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First Sitting in Hilary Term, 1834.

BEFORE MR. JUSTICE GASELEE.

Jan. 17th.

PEARCY v. WALTER.

Under "Not guilty" in trespass, that only can be given in evidence which shews that the defendant did not do the act complained of.

TRESPASS for driving a gig against a horse of the plaintiff's and wounding it, in consequence of which it died. Plea—Not guilty.

Coleridge, Serjt., for the plaintiff.—The inquiry to-day is limited to the ascertaining whether the defendant did or did not drive against the plaintiff's horse. Any inquiry as to whether the injury arose from the plaintiff's negligence, or from the negligence of both plaintiff and defendant, or from inevitable accident, cannot be gone into here, as the general issue only is pleaded.

It appeared that the defendant's gig and a van of the plaintiff's were both in motion, going in opposite directions at the time when the injury was done, which consisted of the shaft of the defendant's gig entering the shoulder of one of the plaintiff's horses, in consequence of which it died. On the part of the plaintiff a witness swore that the defendant, being intoxicated, drove against the plaintiff's horse.

Bompas, Serjt., for the defendant.—The question is, whether the witness is to be believed, who swears to the defendant's driving against the plaintiff's horse? In point of law, if it was inevitable accident, it may be proved under the general issue. *Goodman v. Taylor* (a).

GASELEE, J.—It may be shewn under the general issue,

(a) See the cases of *Boss v. Litton*, ante, Vol. 5, p. 407, and *Goodman v. Taylor*, Id. 410.

that, instead of the defendant driving against the plaintiff, the plaintiff drove against the defendant.

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v.

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Coleridge, Serjt., assented.

Witnesses were called on the part of the defendant.

GASELEE, J., told the jury that the question was, how the shaft got into the horse's shoulder? Whether the defendant drove the shaft against the van horse, or the van horse was driven against the shaft?

Verdict for the plaintiff—Damages 20*l*.

Coleridge, Serjt., and *Butt*, for the plaintiff.

Bompas, Serjt., and *Hoggins*, for the defendant.

[Attornies—*Horsley*, and *Taylor*.]

BEFORE MR. JUSTICE ALDERSON.

MOILLIET and Others v. POWELL the Younger.

Jan. 18 *th*.

ASSUMPSIT.—The declaration stated, that the defendant, on the 1st of April, 1832, at &c., made his bill of exchange in writing, and directed the same to Messrs. Williams & Co., bankers, London, and thereby required the said Messrs. W. & Co. to pay to the order of James Powell, sen., 36*l*. 9*s*. 6*d*., value received, three months after the date thereof, which period has now elapsed; and the defendant then and there delivered the said bill to the said J. P., sen., and the said J. P., sen., then and there indorsed the same to one W. H. S., who then and there indorsed the same to the plaintiffs; and the defendant did

Practice.—
Amendment of
record, and
Judge's order
to admit hand-
writing in an
undefended
cause.

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not pay the said bill, although the same was duly presented on the day when it became due, of which the defendant then and there had due notice.

The instrument in question was in the following form:—

“ £36. 9s. 6d. Coleford, April 1st, 1831.

“ Three months after date I pay Mr. James Powell, sen., or order, thirty six pounds nine shillings and sixpence, value received.

“ At Messrs. Williams & Co., bankers, London.”

The cause was undefended, and

ALDERSON, J., on application on the part of the plaintiff, made an order for the amendment of the declaration, by allowing the instrument to be declared on as a promissory note. His Lordship also allowed the amendment of an order, which had been obtained, for admitting the handwriting of the defendant and the indorsers; and, after these amendments, the cause was tried, and there was a

Verdict for the plaintiffs.

Cowling, for the plaintiffs.

[Attornies—*Adlington & Co.*, and *Jennings & B.*]

WILDE v. JOHN KEEP.

1834.

Jan. 18th.

ASSUMPSIT on a bill of exchange, dated the 14th of March, 1833, for 447*l.* 12*s.* 3*d.*, drawn by the plaintiff on and accepted by the defendant.

The acceptance was signed "John Keep & Co."

A witness, who was clerk to a wholesale grocer in London, stated, that he knew the defendant, whose name was *Joseph Keep*; that he had several times dealt with his employer in the name of *John Keep & Co.*, grocers, at Nottingham. The witness added, that he was present when *Joseph Keep* wrote the acceptance to the bill on which the action was brought, and that he then said that he had not any partner. A letter in the handwriting of the same *Joseph Keep*, signed "*J. Keep & Co.*," was read, promising payment; and it was admitted that two sums of 100*l.* and 50*l.* had been received by the plaintiff on account.

Hoggins, for the plaintiff, said, that the action was against *Joseph Keep*; and, as he had not pleaded in abatement, the verdict might pass against him, though sued by the name of *John*.

Spankie, Serj., stated, that he appeared for *John Keep*, who was the son of *Joseph*.

ALDERSON, J.—Then you will not be injured. They will not take out execution against you, but against *Joseph Keep*. *Joseph* must have been served.

Spankie, Serjt., said, he was in a situation to prove that *John Keep* was the person arrested in the action.

ALDERSON, J.—If you prove that, it will be a different thing.

Assumpsit against *John K.* on "a bill accepted by *Joseph K.* in the name of *John K. & Co.*" There being no plea in abatement:—*Held*, on proof of the facts, that the acceptance was in the handwriting of *Joseph* and that he had before done business in the name he signed, that the verdict must be given against him. But the Judge intimated, that, if it had been proved (as it was stated), that *John* was the party who was arrested in the action, the plaintiff must have been non suited.

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v.
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A witness was called, but was not able to make it out.

ALDERSON, J., to the jury.—I think it will do very well. If you are satisfied that *Joseph Keep* wrote the acceptance to the bill, you will find your verdict for the plaintiff.

Verdict for the plaintiff—Damages, 315*l.* 6*s.*

Hoggins, for the plaintiff.

Spankie, Serjt., for the defendant.

[Attornies—*Paterson* and *Wolston*.]

COURT OF EXCHEQUER.

First Sitting at Westminster in Michaelmas Term, 1833.

BEFORE MR. BARON VAUGHAN.

1833.

Nov. 11*th*.

JOHNSON v. BLACKWELL

If a rule be obtained on Saturday, to make a cause a special jury, which is marked as a special jury at 2 o'clock on that day, and notice of it is given to the plaintiff's attorney at 7 o'clock on that evening, the cause being in the list for Monday, the Judge will try it in its order on Monday as a common jury cause, although there be an affidavit of merits.

ASSUMPSIT for an attorney's bill. Plea—General issue.

In this case a rule was obtained on Saturday, the 9*th* of November, to make the case a special jury cause, and it was marked as such in the Marshal's list at two o'clock on that day, but notice was not served on the plaintiff's attorney till seven o'clock on that evening.

R. V. Richards, for the plaintiff, applied to the learned Baron to try the case in its order, as the notice to the plaintiff's attorney was served too late, the service of the notice being on a Saturday night, and the cause being in the list for trial on the following Monday morning; and he cited the case of *Gunn v. Honeyman* (a).

(a) 2 B. & A. 400. In that case it was held, that, as the rule for the special jury was served too late for the attendance of the special

J. Jervis, for the defendant, opposed the application, on an affidavit stating that there was a good defence on the merits, the defence being that there was no beneficial service; and asked that the cause should stand over till after the term, as special jury cases are not tried in term.

VAUGHAN, B.—I shall try the case in its order to-day, if it is reached.

Application refused.

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First Sitting in London in Michaelmas Term, 1833.

BEFORE MR. BARON VAUGHAN.

MITCHELL and Another v. KING.

Nov. 15th.

ASSUMPSIT to recover a balance of an account. Pleas—*First*, General issue; *second*, a tender of 35*l.* 2*s.* 6*d.* Replication, denying the tender.

It appeared, that the defendant rented the counting-house of the plaintiffs, and saw Mr. Goldie, one of the plaintiffs. The defendant produced 35*l.* 2*s.* 6*d.* in gold and silver and Bank of England notes (*a*). The defendant said, "There is your due, if you like to take it." The plaintiff said he would take it in part, or a pound in part, and give a receipt for it; and the defendant then replied: "I do not admit of its being taken in part, but as a settlement." Mr. Goldie did not take the money.

A tender to be good must be unconditional, so that if the plaintiff take the money, and there be more due, he may still bring an action for the residue: Therefore, where a plaintiff offered to take a sum tendered in part of his demand, and the defendant would only allow him to take it "as a settlement," Held not a good tender.

Mr. Baron VAUGHAN, (in summing up).—A tender, to

jury to be obtained on the day of trial, the cause was properly tried by a common jury.

(*a*) By the stat. 3 & 4 W. 4, c. 98,

s. 6, Bank of England notes are made a good tender for all sums above 5*l.* in all cases, except by the Bank of England and its branches.

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be a legal tender, must be unconditional. If the money is put down only on a condition that a party will take it as a settlement, that is not a good tender. If it was not an unconditional offer, so that the plaintiff might have taken up the money, and if there was more due might still bring an action, the tender is bad. A tender clogged, with the terms that the money is to be taken as a settlement, is not good (a).

Verdict for the plaintiff on the plea of tender.

Goulburn, Serjt., and *Hutchinson*, for the plaintiffs.

Coleridge, Serjt., and *Hoggins*, for the defendant.

[Attornies—*Hutchinson*, and *G. Cox*].

(a) See the cases of *Cheminant* and *Peacock v. Dickerson*, ante, v. *Thornton*, ante, Vol. 2, p. 50; Id. 51.

Adjourned Sittings at Westminster after Michaelmas Term, 1833.

BEFORE MR. BARON GURNEY.

Nov. 28th.

LOVELL v. HILL.

A note whereby a party promises "to pay or cause to be paid" 130*l.*, is a promissory note, and may be declared on as such, and did not require an agreement stamp.

ASSUMPSIT on the following promissory note, the declaration being in the form prescribed by the rule of Court of Trinity Term, 1831 (a).

"£130.

Beachampton, 24th June, 1830.

"I promise to pay, or cause to be paid, to John Lovell, on demand, one hundred and thirty pounds, with lawful interest for the same, value received by me.

"Witness, John Billington.

John Hill."

(a) Ante, Vol. 4, p. 608.

This note was properly stamped as a promissory note.

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J. Jervis, for the defendant.—I submit that this paper ought to have borne an agreement stamp. It is not a promissory note (*a*), as the party promises in the alternative.

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GURNEY, B.—Oh no. That is only his abundant caution.

J. Jervis.—The declaration too is wrong; it is declared on in the common form as a note, without stating that the defendant promised “to pay or cause to be paid.”

GURNEY, B.—That will do.

Verdict for the plaintiff.

Humfrey, for the plaintiff.

J. Jervis, for the defendant.

[Attornies—*Austen & H.*, and *H. Vickery*.]

(*a*) See the case of *Quarterman v. Green*, ante, Vol. 1, p. 92, and the note to that case.

LEVI v. LEVI.

Nov. 28th.

SLANDER.—The declaration stated that the defendant spoke of the plaintiff the following words: “You are a common thief, and I can prove you one.”

From the cross-examination of the plaintiff’s witnesses, it appeared that certain brokers were in the habit of agreeing together to attend sales by auction; and that one of them only should bid for any particular article, and that after the sale they should have a meeting, consisting of

If brokers agree together before a sale by auction that only one of them shall bid for each article sold, and that all articles thus bought by any of them shall be sold again among themselves at a fair price, and the is a conspiracy

difference between the auction price and the fair price divided among them, this for which they are indictable.

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themselves only, at another place, to put up to sale among themselves, at a fair price, the goods that each had bought at the auction, and that the difference between the price at which the goods were bought at the auction, and the fair price at this private re-sale, should be shared among them. This proceeding was called a "knock out."

Erle, for the defendant.—When a man has to dispose of his goods by auction, he does so in the fair hope that he shall be enabled, through the fair and open competition of the public, to get a proper value for them; but this reasonable expectation is to be frustrated by a gang of persons such as have been described. One only is to bid for each article, which must, therefore, either be bought in, or knocked down at any price, however inadequate, and after the sale the parties are to meet together to share in the plunder, as the goods are sold afterwards at a fair price among these very persons, who divide the surplus product as the profits of their scheme. I would say, that conduct of this sort cannot be too much reprehended, and that it amounts to a conspiracy to defraud the owner of the goods.

GURNEY, B., (in summing up).—Owners of goods have a right to expect at an auction that there will be an open competition from the public; and if a knot of men go to an auction upon an agreement among themselves of the kind that has been described, they are guilty of an indictable offence, and may be tried for a conspiracy.

His Lordship left it to the jury to say, whether the defendant by the words he spoke meant to impute felony to the plaintiff?

Verdict for the defendant.

Steer, for the plaintiff.

Erle, for the defendant.

[Attornies—*S. Yates*, and *Person*.]

1833.

STORR and Another v. SCOTT, Bart.

Dec. 2nd.

ASSUMPSIT for goods sold and delivered. Plea—
The general issue.

It appeared, that, in August 1831, the defendant, who had been appointed jointly with the Honourable Mr. Bagot steward of the Lichfield Races, went to the shop of the plaintiff, and desired to see some gold cups, which were shewn him, and he selected one, which he said he thought was in good taste, and would do. The price was 100*l*. The defendant at the time produced a letter from Mr. Hill, the clerk of the course at Lichfield, directed to him, which was as follows:—

When a tradesman makes out an account for goods in the name of a particular person, it must be taken that they were furnished on the credit of such person, unless it be shewn by unequivocal evidence that the credit was in fact given to another.

“ Lichfield, August 17th, 1831.

“ Sir,—Our races are very near, therefore there should be no time lost respecting the order for the gold cup; and it is generally left to the choice of the stewards, which I must get you to take the trouble to order. It must not exceed more than one hundred sovereigns in value, as there are only eleven subscribers. We have always had the cups of Storr and Mortimer, No. 13, New Bond-street. They always gave great satisfaction, and I shall be obliged if you will give them the order for the present year.”

It further appeared that the defendant, when asked whether the cup was to be sent to his residence, said, “ I have nothing on earth to do with it; you must, I suppose, as usual, send the cup to the clerk of the course at Lichfield.” It was admitted that Mr. Hill, the clerk of the course, was at the time indebted to the plaintiffs for the balance of the price of a cup supplied for previous races.

The cup selected by the defendant was sent to Lich-

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field on the 12th of September, 1831; on which day the following letter was sent by the plaintiffs to Mr. Hill.

“We beg to apprise you of our having forwarded by this day's stage the gold cup, which we hope will reach you in time, and meet the wishes of yourself and the subscribers. It has been much admired,” &c.

On the 16th of November, 1831, the plaintiffs wrote again to Mr. Hill, as follows:—“Agreeably to your wish, we hand you our account for the cup, and we trust you are now enabled to favour us with the balance of account delivered. We will then see how far we can contribute towards a remuneration for the late order, as possibly you can oblige us with the money for this cup, in which case we will make a deduction of 6*l*.”

The account referred to in the letter was—

“Mr. William Hill.—Bought of Storr and Mortimer, 1831, August 19th, a silver gold cup, for Lichfield Races, 100*l*.”

On the 11th of June, 1832, the plaintiffs wrote again to Mr. Hill, speaking of the two cups, and saying—“We shall expect a remittance by return of post, otherwise we must adopt unpleasant measures for the payment.”

On the 19th of the same month, the attorney for the plaintiffs wrote to Mr. Hill, claiming 146*l*. 16*s*.; and saying, “Messrs. Storr and Mortimer are informed, that you have received, for the stewards of the Lichfield Races, funds for two cups, furnished you,” &c.

Jervis, for the defendant, relied on the letters and account as inconsistent with an order by the defendant, and as shewing that Hill was the person ordering, and

the defendant only, the person who exercised his choice as steward in the selection.

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Coleridge, Serjt., for the plaintiffs.—The expressions in the letters are ambiguous, and arose from the circumstances. The question is, who was to become liable to Messrs. Storr and Mortimer? There is nothing to get rid of the effect of the defendant's going and ordering the cup. The word *remuneration* used in one of the letters shews that Hill was only an agent, not the person to whom credit was given, but one who recommended the plaintiffs as the persons to make the cup. Justice demanded, that, in the first instance, the plaintiffs should apply to Hill if he had received the money for the stewards from the subscribers. The defendant, by the order, made himself liable in case the fund should fail. Are the plaintiffs to look to an unknown list of subscribers? The defendant's saying I have nothing to do with it, means merely the cup is not to go on my side-board, nor am I to take the trouble of sending it down; it must go, I suppose, in the usual course. Hill was naturally the witness for the defendant, and he is not called. The defendant was the steward, and was to receive the money from the subscribers through the agency of Hill; and, as Hill has not paid, the parties revert to their strict liabilities.

Lord LYNTHURST, C. B., to the jury.—The only question is, upon whose credit the cup was furnished? You will say whether, according to your interpretation of what took place between the parties, it was understood that the credit was to be given to the defendant, or to Mr. Hill? It appears that several cups were shewn, and one eventually selected. The phrase in Hill's letter, "must get you to take the trouble to order," does not shew upon whose credit the order was to be given. I think there is nothing decisive upon the construction of this

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letter, either one way or the other. There is nothing to prevent the defendant from ordering the cup at any other place, if he could not get one to his taste at Storr and Mortimer's. According to the plaintiff's witness, the defendant only selected a cup as one which he thought would do, and which suited his taste. If the case rested here, as the defendant went and ordered the cup, he would be *prima facie* liable, unless you should think there was something in Hill's letter which shewed who was to be the paymaster. But it does not rest here. The phrase, "I have nothing on earth to do with it," may mean I am only an agent, or, I have nothing to do with the management of the cup; it must be left to the clerk of the course. The first letter written by the plaintiffs to Hill does not appear to me to be decisive. But the next letter seems to be more important, and the only one which is not equivocal. It seems very hard to explain that letter, so as to shew that the credit was not given to Hill. The account it incloses is, "Mr. Hill.—Bought of Storr and Mortimer." If Hill was not the person, the account ought not to have been made out in his name. It is said that the word "remuneration" is inconsistent with Hill's ordering. It does not seem to me so. It may be either for the recommendation, or for the selection of the plaintiffs, as the persons to furnish the cup. "Unpleasant measures for the payment," according to my impression, must mean by bringing an action. As to the last letter, it does not seem to me decisive; for although Hill did order the cup, yet they would not make him pay until he had received the funds.

Verdict, for the defendant.

Coleridge, Serjt., and J. H. Lloyd, for the plaintiffs.

Jervis, and Wightman, for the defendant.

[Attornies—J. P. Beavan, and Rushworth.]

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HUNT v. ALGAR and Others.

Dec. 2nd.

LIBEL.—The defendants were the publisher and two of the proprietors of the True Sun newspaper, and it appeared, that, in that paper of the 18th of December, 1832, the following paragraph was inserted:—"Riot at Preston.—From the Liverpool Courier.—It appears that Hunt pointed out Counsellor Seager to the mob, and said 'there is one of the black sheep.' The mob fell upon him and murdered him. In the affray Hunt had his nose cut off. The coroner's inquest have brought in a verdict of wilful murder against Hunt, who is committed to gaol.—Fudge!"

Where one newspaper copied a libellous paragraph from another, adding the word "fudge" at the close:—*Held*, in an action by the party libelled against the publisher of the paper in which the word "fudge" was added, that it was for the jury to say whether the object was to vindicate the character of the party by the addition of the word, or whether it was only introduced for the purpose of creating an argument in case proceedings should be afterwards taken.

The plaintiff, who conducted his cause in person, called a witness, who proved that he had searched the files of the Liverpool Courier, from which the libel purported to be taken, for several months backward, and that the libel was not in it. It turned out, however, on his cross-examination, and that of another of the plaintiff's witnesses, that the paragraph in question did actually appear in a paper called the *Liverpool Journal*, which was published four days previous to the True Sun, and also that the plaintiff had brought an action and recovered damages against that paper, as well as the *Globe*. The paragraph also appeared in the *Globe* on the evening previous to the day on which it appeared in the True Sun; but neither in the *Liverpool Journal*, nor in the *Globe*, was the word "*fudge*" added.

To shew the *animus* with which the publication was made, the following paragraph, which appeared in the True Sun of the 17th December, 1832, the day previous to the publication of the libel, was given in evidence:—"Cobbett is returned; we do heartily rejoice at this: he is a radical worth having. He will add 50 per cent. to the interest of the session's debates. He ought to have been returned for Preston when that poor thing Hunt, who we are glad to

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see turned out, was elected. Hunt degraded the working classes by his ignorance and his base association with the Tories. If Cobbett, in some of his fits of waywardness, should do the latter, he cannot well do the former.—*Spectator*." The True Sun, of a subsequent date, giving an account of a meeting of the working classes, stated that the libel was introduced at that meeting; and that when Mr. Hunt rose to address the people, he was met by repeated cries of the word "fudge." A witness, however, proved that those cries were made by a person named Carpenter, connected with the True Sun, and a few others near him, the meeting consisting of nearly 2000 persons. It further appeared, that the True Sun, a few days before the trial, alluding to the libel, said—"We merely copied it from another paper, in order to give it an unequivocal denial."

The plaintiff contended, that the article was fabricated by the defendants, and that the word "fudge" was merely introduced with reference to the future, that the defendants might afterwards, if the paragraph were complained of, refer to it, as shewing that they intended to discredit the statement. He also contended, that it was a word not to be found in the dictionaries, and of which the meaning was not generally known. He called several witnesses, who stated that they had searched in many dictionaries, and could only find the word in a large edition of Dr. Johnson's Dictionary, published within a few years by a Mr. Todd. One of them, a doctor of medicine, said that he saw the word in the libel, but did not know what it meant in the connection in which it was used; and he considered that, in the Vicar of Wakefield, from which alone its authority was derived, it was used to express contempt for the character of the party speaking, and not as a contradiction of what was considered as untrue. Another, who had been editor of a newspaper, said that he thought it meant stuff and nonsense, but certainly did not consider it as a direct contradiction. Another admitted, on his

cross-examination, that it was in Chalmers' Johnson, in the following manner: "Fudge, an expression of the utmost contempt, usually bestowed on absurd and lying talkers.—Goldsmith." This witness also said, that he thought the working classes might understand it in some such sense as that. It was stated that there had been a demurrer, which was over-ruled.

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Humfrey, for the defendant Algar.—It cannot be believed that the defendants intended to insinuate that Mr. Hunt was a murderer, nor would any body think that he had been committed for murder. The defendants could not (as the plaintiff wished to make it out) have manufactured the paragraph themselves, because it appeared upon the evidence that it was in the *Liverpool Journal* four days, and in the *Globe* one day, previously to its publication in the *True Sun*. The word "fudge" must be taken to mean "stuff and nonsense, and we don't believe it;" and if so, the paragraph is not a libel. As to the demurrer being overruled, all the Court did, and all they could say, was, that the word "fudge" did not so alter the character of the statement, as that a court of justice could take upon itself to say that it was not a libel, but that it was a question for the jury whether it had that effect or not.

Lord LYNTHURST, C. B., (in summing up) said—This is a question entirely for your decision and consideration. It appears that for articles similar, at least in substance, the plaintiff has brought two actions, and obtained verdicts. But notwithstanding, if this be a libel reflecting on his character, he may recover damages in this action also. It is not disputed, that, if the paragraph stood without the word "fudge," it would be a libel. That is not the real question at issue between the parties: the question is, with what motive the publication was made? If you are of opinion that the object of the paragraph which appeared in the *True Sun* was to injure Mr. Hunt, then he

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may maintain the action. On the other hand, if you shall be of opinion, taking the whole together, that the object was to vindicate Mr. Hunt's character from an unfounded charge, then I am of opinion that the action cannot be maintained. The question, therefore, for you will be, with what motive the article was published? With respect to what occurred on the argument of the demurrer, you have nothing to do with it. The Court only decided on the then state of the record, that it was for a jury to say with what motive the publication was made. Mr. Hunt, to shew the motive, said that it was not copied from the *Liverpool Courier*; but it turned out afterwards that it had appeared in the *Liverpool Journal*. I think this mere mistake of the name does not shew any improper motive, when it appears that the *Liverpool Journal* was one of the papers against which Mr. Hunt had brought an action. Then it will be for you to say, the paragraph having appeared in other papers before, what was meant by the addition of the word "fudge." If the word "fudge" was only added for the purpose of making an argument at a future day, then it will not take away the effect of the libel. His Lordship read the evidence, and left the matter to the jury, telling them that the motive of the publisher was the main question, and that the plaintiff only sought to recover nominal damages.

Verdict for the plaintiff—Damages, One Farthing.

The plaintiff in person.

Humfrey, for one of the defendants.

Another defendant in person.

ON the following morning, *Humfrey* applied to his Lordship to certify to deprive the plaintiff of costs; but his Lordship refused.

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FALSE imprisonment.—The first count of the declaration stated, that the defendant, on the 19th day of April, 1831, caused the plaintiff to be wrongfully imprisoned, and kept in prison, for sixteen days, whereby the plaintiff was prevented from attending his business, and was put to an expense of 72*l.* in obtaining his release. The second count was for a common assault. Plea—Not guilty.

The Lord Chancellor sometimes sits in equity, sometimes in bankruptcy, and sometimes in lunacy, but still he has the authority of Lord Chancellor in whichever he is sitting.

It was opened by *Platt*, for the plaintiff—That a commission of bankrupt had been sued out against a person named Nokes, and that the plaintiff was solicitor to that commission; and that, on the 12th of February, 1831, the Vice-Chancellor made an order, directing the plaintiff to pay to George Butler and Joseph Proctor (the assignees) a sum of 56*l.* 13*s.* 11*d.*, and to deliver up books and papers. However, without any demand of either the money or books having been made on this order, the plaintiff was arrested under a warrant issued by the defendant as Lord Chancellor. At the time of this arrest the plaintiff was attending the argument of a motion for a new trial, in the Court of Common Pleas, in a case in which he was the attorney. This arrest took place on the 19th of April, 1831, the warrant bearing date the 12th of March preceding. Immediately after this arrest the plaintiff was, at his own desire, taken before the defendant, who discharged him, and directed him to attend the Court of Chancery. The plaintiff attended the Court of Chancery during nearly the whole of Easter Term; and, within a few days of the end of it, the Lord Chancellor, having conferred with the Lord Chief Justices of the Courts of

The Lord Chancellor, sitting in bankruptcy, committed the solicitor to the commission, for not obeying an order:—*Held*, that the Lord Chancellor had jurisdiction so to do, and that no action lay against him for so doing:—*Held*, also, that the Lord Chancellor, in an action brought against him for so doing, need not plead specially.

The Lord Chancellor has authority, in any particular case, to make an order altering the practice of the Court of Chancery.

If a witness called for the plaintiff be asked, on the part of the defendant, whether the plaintiff had any conversation with him on a

particular subject, and the witness state any thing that the plaintiff said on that subject, the plaintiff's counsel may examine as to every part of the same conversation; but, if the witness state that the plaintiff had no such conversation with him, this does not let in the plaintiff's counsel to examine as to any thing else that the plaintiff said.

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King's Bench and Common Pleas, discharged the warrant for the committal of the plaintiff. By this the warrant was discharged, but not the order for committal, on which the warrant was founded; and, on the last day of term, Sir W. Horne applied to the Lord Chancellor to discharge the order. This application was granted, with costs, which costs were to be deducted from the sum of 56*l.* 13*s.* 11*d.* The plaintiff supposed that this meant his entire costs, but the officers of the Court thought not; and, on the matter being again mentioned by Sir W. Horne, the Lord Chancellor said that he intended it to include the entire costs; but, after conferring with one of his officers, he said he would consider of it; but since that, his Lordship had never given any judgment. It was mentioned to the Lord Chancellor by Sir W. Horne, that the opposite party would go on; but his Lordship said that the proceedings would be stayed. However, notwithstanding this, the plaintiff wrote to Mr. Vizard, his Lordship's secretary of bankrupts, who informed the plaintiff that there was no stay of proceedings; and the plaintiff was again taken into custody on another warrant of the Lord Chancellor, on the 22nd of September, under which he was imprisoned in the Fleet prison till the 22nd of December.

Having stated these facts, *Platt*, for the plaintiff, submitted that the Lord Chancellor had no authority to issue these warrants. By the 6 Geo. 4, c. 26, all former bankrupt acts were repealed; and by that statute no such authority is given. The Lord Chancellor could therefore have no authority to commit for contempt in bankruptcy. Could the Lord Chancellor supersede the right of a party to have his case tried by a jury? If the plaintiff owed money to the assignees, they might have brought an action; and if the Lord Chancellor had the power of committing for contempt in bankruptcy, he should have waited till there was a contempt, by the party refusing to obey the order.

The warrant under which the plaintiff was taken into custody on the 19th of April was read (a).

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Kelly, for the plaintiff, called for the order of the Lord Chancellor on which that warrant was founded, notice having been given to produce it.

Campbell, S. G., for the defendant, declined to produce it.

Platt.—Then it stands as if there was a warrant, and no order.

Mr. Allen proved that he took the plaintiff into custody under this warrant, at the Court of Common Pleas; and that, on the plaintiff being taken before the Lord Chan-

(a) This warrant was as follows:
 Lord Chancellor.

In the Matter of *James Nokes*, a Bankrupt.

WHEREAS, by my order made in this matter, upon the petition of George Butler, of Kennett, in the county of Wilts, ale brewer, and Joseph Proctor, of Gould Square, Crutched Friars, in the city of London, wine merchant, assignees of the estate and effects of James Nokes, a bankrupt, bearing even date herewith, it was ordered that John Dicas, therein named, should stand committed to his Majesty's prison of the Fleet. These are, therefore, in pursuance thereof, to will and require you forthwith, upon receipt thereof, to make diligent search after the body of the said John Dicas, and wheresoever you shall find him to arrest and appre-

hend him, and him safely convey to his Majesty's prison of the Fleet, there to remain until my further order; willing and requiring all mayors, sheriffs, justices of the peace, headboroughs, constables, and all others his Majesty's loving subjects, to be aiding and assisting to you in the due execution of the premises, as they tender his Majesty's services, and will answer the contrary thereof at their peril; and this shall be to you and any of you who shall do the same, a sufficient warrant. Dated this 12th day of March, in the year of our Lord, 1831.

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To William Robert Henry Brown, Esq., Warden of his Majesty's Prison of the Fleet, or to his Deputy attending the High Court of Chancery.

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cellor, he was discharged, and ordered to attend the Court of Chancery. This witness stated, in his cross-examination, that the only objection then made to the arrest was that the plaintiff was privileged, because he was attending the Court of Common Pleas.

Mr. Roberts, a clerk of Mr. Dicas, proved that Mr. Dicas attended the Court of Chancery daily, for nearly a fortnight.

Campbell, S. G., asked the witness whether Mr. Dicas had not told him that he had presented a petition to the Lord Chancellor? The witness said that he had not.

Follett, for the plaintiff, wished to ask the witness whether he had heard Mr. Dicas say any thing about an order?

LORD LYNTHURST, C. B.—If the witness, in answer to a question put by the other side, had given evidence of a conversation, you might have had the whole of that conversation; but the witness has said that there was no conversation such as that which is inquired for.

The question was not put.

Mr. Brown, the warden of the Fleet, put in the second warrant (*a*).

The order for the second commitment was read (*b*), and

(*a*) This was in exactly the same form as the other warrant, and was dated August 10, 1831.

(*b*) Lord Chancellor.

Wednesday, 10th Aug. 1831.
 In the Matter of *James Nokes*, a
 Bankrupt.

WHEREAS George Butler, of Kennett, in the county of Wilts, ale brewer, and Joseph Proctor, of Gould Square, Crutched Friars,

London, wine merchant, assignees of the estate and effects of James Nokes, a bankrupt, did this day prefer their petition to me, shewing, that, by an order made in this matter, on the petition of the petitioners, by his Honor the Vice-Chancellor, bearing date the 2nd day of February, 1831, it was ordered, that John Dicas, the person mentioned in the said order,

also examined copies of the affidavits on which the first commitment was founded. These affidavits did not state

should, within four days after he should be duly and personally served with the said order, pay to the petitioners the balance or sum of 56*l.* 13*s.* 11*d.*, in the said order mentioned; and it was ordered that the said John Dicas should, within the like period of four days, deliver up to the petitioners, upon oath, all papers and writings, receipts and vouchers, touching or relating to the estate of the said bankrupt, in his custody or power; and in case default should be made by the said John Dicas, either in the payment of the said money or the delivery of the said documents or any of them, as thereinbefore directed, that the said John Dicas should stand committed to his Majesty's prison of the Fleet. That the petitioners, by virtue of their power of attorney, bearing date the 23rd day of May last, authorized and appointed Charles Bischoff, of No. 8, Copthall Court, London, solicitor, their lawful attorney, to ask, demand, recover, and receive from the said John Dicas the said balance or sum of 56*l.* 13*s.* 11*d.* in the said order mentioned and directed to be paid as therein mentioned. That the said Charles Bischoff, as the attorney of the petitioners, duly and personally served the said John Dicas with a true copy of the said order on the 31st day of May last, also with a true copy of the said power of attorney, by virtue of which the said Charles Bischoff duly demanded from the said John Dicas payment of the said

sum of 56*l.* 13*s.* 11*d.*, and produced, at the same time, the originals of the said power of attorney and order; whereupon the said John Dicas claimed to be allowed the costs, under an order made by me on the 7th day of May last, as a set-off; but no order to such effect had then been served, nor was it known by the petitioners or their said attorney that any order to such effect had been obtained. That, shortly after such demand, the said John Dicas served the said order of the 7th May. That the said John Dicas having delayed to carry his bill of costs to be taxed, under the said last-mentioned order, the said petitioners caused an office copy of such order to be obtained, and a warrant to be served on the said John Dicas, whereby he was required to bring into the office of John Edward Dowdeswell, Esq., the Master to whom the said last-mentioned order was referred, on or before the 2nd day of July, 1831, his bill of costs to be taxed, under the order of the 7th May last in this matter. That the said Master by his certificate bearing date the 15th day of the said month of July, certified to me that the said John Dicas had not brought in before the said Master his bill of costs to be taxed, although he had been duly summoned so to do, as by oath made appeared. That, on the 20th day of the said month of July, the said Charles Bischoff, as the attorney of the petitioners, did duly and personally serve the

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any demand and refusal of the money and papers, after the Vice-Chancellor's order to pay the one and to return the other in four days. These copies were produced by the son of the plaintiff, who stated that the plaintiff was a solicitor of the Court of Chancery, and acted as solicitor to the commission against Nokes, and as such received assets which belonged to the assignees. The order discharging the first warrant was read (a).

said John Dicas with the certificate of the said Master Dowdeswell, and did at the same time again demand of the said John Dicas payment of 56*l.* 13*s.* 11*d.*, as also the delivery of all papers and writings, receipts and vouchers, touching or relating to the estate of the said bankrupt, in the custody or power of the said John Dicas. That the said John Dicas refused to pay the said sum of money, or to deliver the said papers and writings demanded as aforesaid, in pursuance of the said order of the 2nd day of February last, or in any respect to comply therewith; and therefore praying that the said John Dicas might immediately stand committed to his Majesty's prison of the Fleet, for the contempt of the said order of the 2nd February last, and that my warrant might issue for that purpose. Now, upon reading the said petition and an affidavit of the petitioners, and also an affidavit of Charles Bischoff, I do order that the said John Dicas do stand committed to his Majesty's prison of the Fleet, and that a warrant of commitment do forthwith issue for that purpose.

Brougham, C.

(a) Lord Chancellor.

Saturday, 7th May, 1831.

In the Matter of *James Nokes*, a Bankrupt.

WHEREAS George Butler, of Kennett, in the county of Wilts, ale brewer, and Joseph Proctor, of Gould Square, London, wine merchant, assignees of the estate and effects of James Nokes, did, on the 12th day of March last, prefer their petition to me, stating, that, by an order made in this matter, on the petition of the petitioners, by his Honour the Vice-Chancellor, bearing date the 2nd day of February, 1831, it was ordered, that John Dicas, the person mentioned in the order, should, within four days after he should be duly and personally served with the said order, pay to the petitioners the balance or sum of 56*l.* 13*s.* 11*d.*, in the said order mentioned; and it was ordered that the said John Dicas should also, within the like period of four days, deliver up to the petitioners, upon oath, all papers and writings, receipts and vouchers, touching or relating to the estate of the said bankrupt, in his custody or power; and in case default should be made by the said John Dicas, either in payment of the said mo-

The Earl of Eldon stated that he was Lord Chancellor during twenty-five years, and during that time had sat in bankruptcy; and that, if he had ever committed a party for disobeying an order to pay money, or delivery of papers, without proof of a demand and refusal, that would be a mistake. In his cross-examination his Lordship said, that he, when Lord Chancellor, committed to the Fleet for contempt in bankruptcy. His Lordship said that he

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ney or delivery of the said documents, or any of them, as therein before directed, that the said John Dicas should stand committed to his Majesty's prison of the Fleet: That the said John Dicas was duly and personally served with the said order on the 22nd day of February last: That the said John Dicas had thitherto refused to pay the said sum of money, or to comply with the said order, in the delivery of all papers and writings, receipts and vouchers, touching or relating to the estate of the said bankrupt, in the custody or power of the said John Dicas; and praying that the said John Dicas might immediately stand committed to his Majesty's prison of the Fleet, for his contempt of the said order, and that my warrant might issue for that purpose. And whereas, by my order made on the 12th day of March last, upon reading the said petition and the several affidavits filed in support thereof, it was ordered that the said John Dicas do stand committed to his Majesty's prison of the Fleet, and that a warrant of committal do forthwith issue for that purpose. And whereas, on the 7th day of May instant, ap-

plication was made to me by Mr. Solicitor-General, of counsel for the said John Dicas, that my aforesaid order might be discharged, and that the costs of the said John Dicas, of and attending that application, might be paid to him by the said George Butler and Joseph Proctor. Now, upon hearing my said order read, and what was alleged by Mr. Solicitor-General, of counsel for the said John Dicas, and by Mr. Russell, of counsel for the said George Butler and Joseph Proctor, and also the affidavits filed by both the said parties read, I do order that my aforesaid order, bearing date the 12th day of March last, be, and the same is, hereby discharged. And I do further order, that it be referred to the Master of the Court of Chancery, in rotation, to tax the costs of the said John Dicas, of and attending the aforesaid application; and that the amount thereof, when taxed, be allowed to him as a set-off against the balance or sum so claimed as aforesaid to be due from him to the said George Butler and Joseph Proctor.

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could not state whether there ought to be a new demand after a four-day order.

Sir W. Horne proved that he was counsel for the present plaintiff in an application to the Lord Chancellor, but did not at all perfectly remember the circumstances; but he thought that the question was, whether there should be a second demand after the four-day order? In his cross-examination he said, that the Lord Chancellor made orders in bankruptcy, and committed for the disobedience of them. He also stated, that, when an order is made for the payment of money and delivery of papers, a demand should be made, and, if not complied with, there is another order to pay the money and deliver the papers in four days, this being called a four-day order; and, if that four-day order is not complied with, there is an order made that the party shall be committed.

Mr. Pensam, who had been twelve years the secretary of bankrupts to Lord Eldon, stated that the practice of the Court of Chancery was to make personal service of the four-day order, and for some person entitled to make a demand at and after the service of that order; and he believed, that in no instance had Lord Eldon committed a party without such a demand.

Two letters of the plaintiff, written to the defendant, asking compensation for the two imprisonments, were put in.

Campbell, S. G., for the defendant.—I submit that the plaintiff must be nonsuited. This action is brought against the defendant as Lord Chancellor; and I say, that, by the law of England, no such action lies. Mr. Dicks alleges that he has been illegally imprisoned by a warrant in March, and by another warrant in August. Both these warrants were granted by the Lord Chancellor as Lord Chancellor, and within his jurisdiction as holding the great seal. With respect to the second imprisonment,

there is no irregularity complained of. The order for that is put in, and that order recites an order of the Vice-Chancellor to pay 5*6*l. 13*s.* 11*d.* to the assignees; and it recites a demand. It then recites a four-day order, and states that there was a second demand upon that order, and a refusal to comply with it. Therefore, unless there is no jurisdiction in the Lord Chancellor in bankruptcy to commit the solicitor who sues out the commission for a contempt, the action clearly cannot be maintained in respect of that imprisonment. With respect to the first imprisonment, the warrant only is put in together with the three affidavits on which it was granted; and it is also in evidence that the plaintiff was arrested in the Court of Common Pleas, and claimed privilege, and made no other objections. Your Lordship is therefore asked to make the Lord Chancellor liable for the irregularity of the tipstaff in arresting an attorney while attending a cause, and to presume that there was no order, no four-day rule, and no demand upon it.

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Lord LYNTHURST, C. B.—There is this further fact, that the order for the first commitment was discharged.

Campbell, S. G.—The only question made at first was as to the privilege; and the Attorney-General has stated that a question was afterwards raised as to whether a second demand was necessary after a four-day order; and on that point Lord Eldon, one of the greatest lawyers who ever sat on the bench, says, that he considers it doubtful. It was never decided, before the case of *Mr. Dica*s, that a second demand was necessary.

Lord LYNTHURST, C. B.—*Mr. Pensam* says, that, according to his experience, it was always the course of practice.

Campbell, S. G.—That was the practice as far back as he knew; but Lord Eldon is doubtful. But I say, that,

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whether the proceedings are regular or irregular, it makes no difference. Let it be supposed that an irregular order was made, or an irregular warrant issued; does an action lie against a judicial officer? If an attachment is sued out for the non-payment of money, pursuant to the Master's allocatur, or for non-performance of an award, and the affidavits are not regular, is an action to be brought against the five Judges of the Court of King's Bench? I have moved, over and over again, to discharge attachments on account of irregularity in the previous proceedings; and I shall shew, by authorities and by dicta—

Lord LYNDHURST, C. B.—Why did you allow the evidence to go on? You were asking as to the practice of the Court of Chancery. Lord Eldon was asked questions respecting it; so was Mr. Pensam. This was an order pronounced judicially, and this warrant is founded on a judicial order. How can an action of trespass lie after that?

Campbell, S. G.—I did not wish to stop the reception of the evidence, as I wished to hear what it would amount to.

Lord LYNDHURST, C. B.—The Lord Chancellor is placed at the head of the jurisdiction of bankruptcy to bring in his authority as Lord Chancellor.

Campbell, S. G.—So it has been for three centuries. My first proposition is, that no action of trespass will lie against a judicial officer. In *Bushel's case* (a), where a jury were fined, which was clearly an illegal act, Lord Hale says: "I speak my mind plainly, that an action will not lie.

(a) 1 Mod. 119. A very elaborate judgment, determining that a Judge has no right to fine or commit a jury who find against his direction, will be found in *Bushel's case*, Vaugh. Rep. 135. The jury fined in that case, refused to convict William Penn of an unlawful assembly in Gracechurch-street.

For a *certiorari* and an *habeas corpus*, whereby the body and proceedings are removed hither, are in the nature of a writ of error. And in case of an erroneous judgment given by a Judge, which is reversed by a writ of error, shall the party have an action of false imprisonment against the Judge? No, nor against the officer neither. The *habeas corpus* and the writ of error, though it doth make void the judgment, it doth not make the awarding of the process void to that purpose; and the matter was done in a course of justice. They will have but a cold business of it. An *habeas corpus* and *certiorari* is a writ of right, the highest writ a party can bring." So day was given to shew cause. So in *Hammonds v. Howell* (a), where "the plaintiff brought an action of false imprisonment against the Mayor of London, and the Recorder, and the whole Court at the Old Bailey, and the sheriffs and gaoler, for committing him to prison, at a sessions there held. The case was this:—Some Quakers were indicted for a riot, and the Court directed the jury, if they believed the evidence, to find the prisoners guilty, for that the fact sworn against them was in law a riot: which, because they refused to do, and gave their verdict against the direction of the Court in matter of law, they committed them. They were afterwards discharged upon an *habeas corpus*; and one of them brought this action for the wrongful commitment. Serjeant Maynard moved for the defendants that they might have longer time to plead, for a rule had been made that the defendants should plead this first day of this term. The court declared their opinions against this action, viz.: That no action will lie against a Judge for a wrongful commitment any more than for an erroneous judgment; and Munday, the Secondary, told the Court that giving the defendants time to plead countenanced the action, but granting imparlances did not. So they had a special imparlance till Michaelmas term next; and Atkins

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said—It was never imagined that justices of oyer and terminer and gaol delivery would be questioned in private actions for what they should do in execution of their office ; if the law had been taken so, the statute of 7 Jac. c. 5, for pleading the general issue, would have included them all as well as inferior officers.” And in that case the Court of Common Pleas held that no action would lie. After these authorities the general maxim will, I presume, not be denied, that no action lies against a Judge acting within his jurisdiction. With respect to the authority of the Lord Chancellor in bankruptcies, Lord Eldon in an *Anonymous* case (a) says : “ This is a question of great importance, as it concerns both creditors and bankrupts, but particularly as it concerns bankrupts ; for, without the existence of such a power, the mode of allowing certificates would be very different from that which exists at present. I first had to consider whether the Chancellor could order witnesses to attend the commissioners for the purpose of proving the various requisites to support the commissions, and, after great deliberation, was satisfied that I ought, when necessary, to compel such attendance. There is, however, no express authority given to me by the statutes for that purpose ; neither is any express authority given to me to convict for a contempt, by disobedience to an order made upon a petition : but can any doubt exist whether I possess such power ? The bankrupt statutes are framed with a view to the authority with which the Chancellor is intrusted in the exercise of his ordinary jurisdictions, and when these statutes are silent as to the mode of compelling obedience to the orders that may be necessary for carrying the provisions of the statutes into effect, it is enforced by the general jurisdic-

(c) 14 Ves. 449. It appears by 1 Rose, 250, that this case was *Ex parte Stevens*. It was a question upon a petition in bankruptcy, whether the Lord Chancellor

could compel the bankrupt to attend the commissioners, he having passed his last examination, and obtained his certificate.

tion for the attainment of the objects of the commission. If the bankrupt refuses to attend, when his attendance is necessary, after he has passed his examination, it is clear that he ought to be compelled to attend. The power to compel him must be vested somewhere. It is impossible to execute the statutes without implying such a power, which indeed is justified by the old acts; the jurisdiction must be with the Great Seal. The commissioners, therefore, must make an order for the attendance of the bankrupt, and I will enforce it." And in the case of *Ex parte Bradley (a)*, Lord Eldon says: "I am aware of having weighed well in the case cited by Mr. Montague, [the case before cited], and in other cases, the authority under which the Chancellor acts in bankruptcy in circumstances not specially provided for by the statutes; and I am convinced, that it was the intention of the Legislature, in giving jurisdiction to the Chancellor in bankruptcy, to give him power to use in bankruptcy the authority used in causes in Chancery, where no specific authority is given by the statutes. In this Lord Hardwicke supports me. I will not presume disobedience in Mr. Townsend; if there should be, I must perform the disagreeable duty of committing him."

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Lord LYNTHURST, C. B.—The Lord Chancellor sits as Lord Chancellor not only in equity, but also sometimes in bankruptcy, and sometimes in lunacy.

Campbell, S. G.—In the case of *Ex parte Cowan (b)*, it was held, that, supposing the Lord Chancellor to have jurisdiction generally on the subject of the petition, the

(a) 1 Rose, 202. The object of the petition in this case was, that the bankrupt might be directed to deliver up certain papers in his possession relating to his estate, which had been delivered to him by an assignee who

had subsequently been removed, and to attend the commissioners for the purpose of being examined. He had passed his last examination.

(b) 3 B. & A. 123.

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Court of King's Bench has no authority to revise his order. In the present case the property was the property of the assignees, and the person against whom the order was made was the solicitor to the commission; therefore, as to the jurisdiction of the Lord Chancellor there can be no doubt; and the present action is an action brought against a Judge for an order made by him as a Judge.

Wightman, on the same side.—Mr. Platt has put this case upon two propositions,—*first*, that the Lord Chancellor in bankruptcy has no jurisdiction to commit; and *secondly*, that if he had, and it was exercised irregularly, an action lies.

Lord LYNDHURST, C. B.—There is no doubt about his jurisdiction.

Wightman.—On the first point I submit, that, if the Lord Chancellor had authority to make the order, he had authority to commit. With regard to the second point, I will assume, for the purposes of my argument, that the order was irregular, and that it was so in the opinion of Lord Eldon. But, supposing that Lord Brougham had determined the contrary for the first time, and had held that one demand was sufficient, as it is in the courts of law, would it be competent for this Court, or the Court of King's Bench, to hold that he was liable to an action, because he had not followed the practice of his predecessors?

Lord LYNDHURST, C. B.—Could this order have been the subject of revision?

Wightman.—There is no appeal from the Lord Chancellor in bankruptcy, and I therefore apprehend that there could be no mode of revising it. If such a question were to come before the present Court of bankruptcy, and that Court should grant a rule for an attachment without sufficient affidavits, would an action lie against

the Judges? If not, can an action be maintainable against the Lord Chancellor, for an order made by him when sitting in bankruptcy? If the Lord Chancellor had made the order, would the court have held that an action would lie, or, on a return of these facts to a *habeas corpus*, would they discharge a prisoner?

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Platt, for the plaintiff.—The question here is, whether Mr. Dicaſ can appeal to a jury of his country, or whether, by the circumstance of this being an order of the Lord Chancellor in bankruptcy, Mr. Dicaſ is eſtopped from bringing an action? There have been ſeveral caſes cited; but all of them (except thoſe decided in the Court of Chancery) apply to Judges of courts of record. The court of review is made a court of record by a ſpecial act of Parliament, but the Chancellor ſitting in bankruptcy is not ſitting in a court of record. The juriſdiction of the Chancellor as Chancellor is to give redreſs where the law affords no remedy.

Lord LYNTHURST, C. B.—The Courts of Equity have a juriſdiction concurrent with the courts of law in many caſes—account, for inſtance.

Platt.—If I receive a ſum of money *in ſolido*, a Court of Equity would have no juriſdiction, on a bill being filed, to order me to pay the money. But one point the Solicitor-General ſeems to have loſt ſight of; there is no ſpecial plea.

Lord LYNTHURST, C. B.—Mr. Dicaſ is a ſolicitor of the Court of Chancery. Has not the Lord Chancellor a power of ordering a ſolicitor to pay over money? The Chancellor ſometimes ſits in equity, ſometimes in bankruptcy, and ſometimes in lunacy; but ſtill he has the authority of Lord Chancellor in whichever he is ſitting. Can you contend that a Lord Chancellor may

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not make an order on a solicitor as an officer of his Court.

Platt.—As to the first arrest, there is no proof of anything but the warrant. There is no proof of any order; and, for aught that appears, the Lord Chancellor might have issued the warrant without any order at all. I would refer to the case of *Beaurain v. Sir W. Scott* (a).

Lord LYNTHURST, C. B.—There the Judge had no jurisdiction. The Judge is only protected where he has jurisdiction.

Platt.—In the case of *Beaurain v. Sir W. Scott*, the defendant, Sir W. Scott, as Judge of the Consistorial Court of London, had made an order that the plaintiff should become guardian *ad litem* to his son, who was an infant, and excommunicated him for refusing to become guardian; and it was there held that an action would lie against a Judge of that Court if he exceeded its jurisdiction, and the plaintiff recovered damages. In the present case, it appears, that there was no demand.

Lord LYNTHURST, C. B.—Has not the Lord Chancellor the power of altering the practice of the Court of Chancery? Lord Chancellors have altered the practice in most important particulars.

Platt.—By a general rule, no doubt.

Lord LYNTHURST, C. B.—I have no doubt that the Chancellor has the authority to make an order in a particular case, altering the practice.

Platt.—The Lord Chancellor has given evidence

(a) 3 Camp. 388.

against himself; for, by discharging Mr. Dicaș, he admits the proceeding to be irregular. I trust that your Lordship will not stop the case.

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Kelly, on the same side.—I submit that, unless some statute can be cited, giving liberty to the present defendant to give special matter in evidence under the general issue, he cannot avail himself of this defence under the present plea. A Judge of a court of record, and perhaps a Judge not of a court of record, may have the jurisdiction that is contended for; but the case of *Bushel*, which is cited as an authority to shew that Judges of a court of record have the power of committing for contempt, goes also to shew that they must plead specially, although, in that case, the learned Chief Justice gives an opinion which seems rather extrajudicial. The numerous acts of Parliament allowing the general issue to be pleaded, leads to a conclusion that there must be a special plea in cases not thus provided for. The present defendant might have pleaded that he was Lord Chancellor, and sitting in bankruptcy, and so forth. With respect to the defence itself, supposing that it can be given in evidence under the general issue, I take the distinction to be between the case of a Judge of a court of record, and a Judge of a court not of record, though I admit, that, by some stretch of construction, the Chancellor, sitting in bankruptcy, has been treated as a Judge of a court of record. The case of *Beaurain v. Sir W. Scott* was one in which the Judge was the Judge of an ancient court, which had the power of excommunication; and the cases cited in which actions are held not to lie are all cases of courts of record. I admit that the Lord Chancellor is a Judge, and in this instance acted judicially, and had jurisdiction over the subject-matter before him; but, if the matter was not a contempt, he, being a Judge not of a court of record, is liable to an action of trespass. The present case

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stands thus: the Lord Chancellor, having a power of committing for a contempt if duly proved, has here committed without a four-day order and a demand upon it. It therefore appears, that there was no contempt, and the question will then be, whether the Chancellor, sitting in bankruptcy, has the power to commit for contempt, when it appears by the instrument by which he commits that there was no contempt?

Follett, on the same side.—I understand your Lordship to consider that the Chancellor has the power to commit in bankruptcy, and that it was so considered by Lord Eldon, although I confess that I do not discern how the Chancellor got that jurisdiction.

Lord LYNTHURST, C. B.—It is incident to his office of Chancellor.

Follett.—Lord Henley says, in his work on Bankruptcy (*a*), that the solicitor is a minister of the Court; and I will concede for the moment that the Lord Chancellor may issue an order to commit for a contempt when sitting in bankruptcy; but the fact here is, that an order was issued irregularly, as it was grounded on affidavits not sufficient to warrant such an order. If any commissioner of bankruptcy had committed a party who was not in contempt, it is quite clear that an action would have lain; and the Lord Chancellor ought to have satisfied himself that there had been a demand before he made the order for the commitment. In the present case an action of trespass is brought, and the general issue pleaded. The Solicitor-

(a) P. 214. In 6 Ves. 1, Lord Eldon says—"Instead of solicitors attending to their duty as ministers of the court, for they are so, commissions of bankrupt are treated as matter of traffic. A. taking

out the commission, B. and C. to be his commissioners; they are considered as stock in trade, and calculations are made how many commissions can be brought into the partnership."

General, who concedes that the commitment was irregular, after likening this to a most curious case, where the Judges committed a jury, contends that no action will lie. There is, however, no case in which it has been held, that an action does not lie against a Judge of a court of equity; and in no one case was there ever an action against a Judge of a court of common law, where the justification was not pleaded specially. In trespass, (excepting the cases provided for by special enactment), a qualification must always be pleaded specially. In the case of *Garnett v. Ferrand* (a), the Lord Chief Justice referred to every case that had been decided, and in every one there was a special plea. In the stat. of 21 Jac. c. 12, s. 5 (b), the Lord Chancellor is not included, and that statute only applies to justices and parish officers. The learned Solicitor-General does not say that the Chancellor has not exceeded his authority, nor that the plaintiff has not received injury, but that the plaintiff has no right to redress; and for this he cites a case where the Judge committed the jury, which is certainly a precedent drawn from bad times. Where a party, not being a Judge of a court of record, improperly grants a warrant, on which another is imprisoned, an action lies. It lies against a secretary of state (c), and against the speaker of the House of Commons (d); and, in both those cases, there were special pleas of justification pleaded. The learned Solicitor-General will perhaps say, that this is a case within the 44th section of the Bankrupt Act, 6 Geo. 4, c. 16, which enables persons acting "in pursuance" of that act to plead the general issue. However, that provision is confined to persons acting in pursuance of that act; and this warrant, in the present case, was issued neither under nor *in pursuance* of that act, but under the jurisdiction of the defendant as Lord

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(a) 9 D. & R. 657.

(c) *Beardmore v. Carrington*, 2

(b) Set forth ante, Vol. 1, p. 41, Wils. 244.

n.

(d) 14 East, 1.

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Chancellor. In the case of *Edge v. Parker* (a), where the assignees of a bankrupt entered the house of a third person to take the goods of the bankrupt, it was held that the entry was not an act done in pursuance of this statute; and Mr. Justice Bayley says—"The statute gives no express power to the assignee to enter. It directs the property to be assigned. The ownership is given by the act, but the assignee does not seize by virtue of the act, which is wholly silent as to seizure; it leaves him to exercise his own judgment." In the present case the defendant not only does not do this by the directions of the stat. 6 Geo. 4, c. 16, but does it by virtue of his power as Lord Chancellor. The stat. 6 Geo. 4, c. 16, therefore, does not apply, nor does the statute of James; the defendant must, therefore, like the Judges of the common law, who are not within the statute of James, plead any matter of justification specially.

Campbell, S. G.—I will begin with the objection that the general issue is in this case not a sufficient plea. To that objection there are three answers: *First*, that it is sufficient at common law; *second*, that it is sufficient on the 6th Geo. 4, c. 16; and *third*, on the 42 Geo. 3, c. 85, s. 6 (b).

(a) 8 B. & C. 701, and M. & R. 365.

(b) Which recites, that "whereas it is expedient to extend the provisions of an act passed 21 Jac. 1, intituled, 'An act to enlarge and make perpetual the act made for ease in pleading against troublesome and contentious suits prosecuted against justices of the peace, mayors, constables, and certain other his Majesty's officers, for the lawful execution of their office,' made in the seventh year of his Majesty's most happy reign,

to all persons who may by law commit to safe custody either in or out of this kingdom," and enacts—"That, from and after the passing of this act, the said recited act, and all the provisions therein contained, shall extend, and be deemed, taken, and construed to extend, to all persons having, holding, or exercising, or being employed in, or who may hereafter have, hold, or exercise, or be employed in, any public employment, or any office, station, or capacity, either civil or

First, At common law. I say that if it appears that the act was done by a party as a Judge, it is not trespass, as he merely pronounces his judgment. If the party be a ministerial or magisterial officer, he must plead specially, as is done in the case of sheriffs, and as was done in the cases of Mr. Abbott and Lord Halifax. In the very case of *Bushel*, the Court intimated that there was no necessity for the defendants to have time to plead, as no special plea was necessary. My friends say that the Lord Chancellor derives no authority from the statute 6 Geo. 4, c. 16, but I say that he does; it is that statute that creates the jurisdiction in bankruptcy. The Lord Chancellor had no jurisdiction at common law to issue commissions of bankrupt; but the Legislature, he having the power of committing gave him power to act in bankruptcy; and by the 44th sect. of the stat. 6 Geo. 4, c. 16, which makes a new bankrupt code——

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Lord LYNTHURST, C. B.—Mr. Solicitor General, I have

military, either in or out of this kingdom, and who, under and by virtue, or in pursuance of any act or acts of Parliament, law or laws, or lawful authority within this kingdom, or any act or acts, statute or statutes, ordinance or ordinances, or law or laws, or lawful authority, in any plantation, island, or colony, or foreign possession of his Majesty, now have, or may hereafter have, by virtue of any such public employment, or such office, station, or capacity, power or authority to commit persons to safe custody; and all such persons having such power or authority as aforesaid, shall have and be entitled to all the privileges, benefits, and advantages given by the provisions of

the said act, as fully and effectually, to all intents and purposes, as if they had been specially named therein: provided always, that where any action, bill, plaint, or suit, upon the case, trespass, battery, or false imprisonment, shall be brought against any such person as is in this act described as aforesaid, in this kingdom, for or upon any act, matter, or thing done out of this kingdom, it shall be lawful for the plaintiff bringing the same to lay such act, matter, or thing to have been done in Westminster, or in any county where the person against whom any such action, bill, plaint, or suit shall be brought shall then reside, any thing in this act to the contrary thereof notwithstanding."

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had no doubt upon this from the first. I am clearly of opinion that this action cannot be maintained. The Lord Chancellor was sitting in bankruptcy when these judgments were pronounced; and even supposing these judgments to be erroneous, they cannot be questioned in a court of law. With respect to the other point, I am of opinion that there is no necessity for a special plea, and that the general issue is quite sufficient, as no action will lie. Gentlemen of the jury, my opinion is, that your verdict ought to be for the defendant, and that no action will lie.

Verdict for the defendant.

Platt, for the plaintiff, tendered a bill of exceptions.

Platt, Kelly, Follett, and *Gunning*, for the plaintiff.

Campbell, S. G., and *Wightman*, for the defendants.

[Attornies—*Dicas*, and *Blower & V.*]

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GREGORY v. TUFFS.

DEBT on the stat. 25 Geo. 2, c. 36 (a), for keeping an unlicensed house for music and dancing. It appeared that the defendant kept a public-house, called the Blue Anchor, in East Smithfield.

F. Pollock, in his opening, cited the cases of *Clark v. Searle* (b), and *Archer v. Willingrice* (c).

It was proved by two witnesses, on the part of the plaintiff, that on more than twelve different nights, between the 1st of July and the 21st of September, there was in a tap-room at the defendant's house a man seated on an elevated seat playing the violin, and persons dancing, the persons dancing being, at some of the times, four women, and at the others two women and two men; and that, on each occasion, the dancing continued as long as the witnesses staid, which was about a quarter of an hour. It was also proved, that no money was taken for admission; and that the words, "licensed dealer in foreign wines and spirits," were painted on the defendant's house, but no words importing that the defendant had a licence for music under the stat. 25 Geo. 2, c. 36.

Law, for the defendant.—I submit, that this is not the proper way of proving that the house is not licensed (d). Whether it is licensed or not will appear by the records of the sessions.

(a) Set forth ante, Vol. 3, p. 473, n. See also the form of declaration, Id. 471, n.

(b) 1 Esp. N. P. C. 25. In that case it was held that a room into which any person was admitted to dance who paid for a ticket was a room within this act.

(c) 4 Esp. 186; cited ante, Vol. 3, p. 473, n.

(d) As to the proving of negative averments, see the cases of *Rex v. Turner*, 5 M. & S. 206, and *Parsons v. Chapman*, ante, Vol. 5, p. 33.

Dec. 3rd.

A room used for public music or dancing is within the stat. 25 Geo. 2, c. 36, although it is not exclusively used for those purposes, and although no money be taken for admission; but the mere accidental or occasional use of a room for either or both those purposes will not be within that statute.

Proof that there is nothing painted on the house denoting that it is licensed under that statute, is sufficient *prima facie* evidence, in an action for penalties, that it is unlicensed.

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LORD LYNDHURST, C. B.—By this act of Parliament, persons having licensed houses for music are to have it painted on the outside of the house that they are so, and it is proved that that is not so here.

Law.—This not being painted in front of the house may make the party liable to a penalty, but still he may be licensed.

LORD LYNDHURST, C. B.—The act has directed it to be done; and if it is not so, it is *primâ facie* evidence that this is an unlicensed house. But you may rebut it if you can do so.

Law, for the defendant, submitted, that, as no money was taken for admission, and as the witnesses only saw the dancing for a quarter of an hour at a time, it might be merely the act of persons who had come to the house of the defendant and danced without his knowledge, and not a keeping of a room for dancing within the meaning of the act of Parliament. He cited the case of *Shutt v. Lewis (e)*.

LORD LYNDHURST, C. B. (in summing up).—I agree entirely with the learned counsel for the defendant, that the mere occasional or accidental use of a room for the purpose of music or dancing is not within this act of Parliament; but the case he has cited does not apply, as the room there was hired by a gentleman of the Jewish persuasion for the use of his friends during the Passover, and it therefore was for the time his private room. I am of opinion, that, to bring a case within this act of Parliament, it is not essential that the room should be used exclu-

(e) 5 Esp. 128. In that case Lord Ellenborough said, "that the mere use of a room in a house for the temporary purpose of dancing or music did not come within the intent or meaning of the statute, as the house or room should have been *kept* for that purpose."

sively for this purpose; nor is it necessary that money should be taken for admission. One can easily understand, that a person keeping a public-house would find it his interest to have an attraction to draw persons in great numbers to his house, as it would remunerate him without his receiving money specifically for admission into the room. It certainly seems to me to be difficult to say that this could have gone on in the defendant's house from July to September without his knowledge, unless he was absent from home during the whole of the time, which, if the fact were so, he might easily have proved. The case therefore comes to this, are you satisfied that this room was kept by the defendant for the purpose of public dancing?

Verdict for the defendant.

F. Pollock, Follett, and Mansel, for the plaintiff.

Law, Platt, and Bodkin, for the defendant.

[Attornies—*Begbie* and *C. Isaacs*.]

IN the ensuing term, *Follett* obtained a rule to shew cause why there should not be a new trial, on grounds not at all affecting the proposition of law above laid down.

TAYLOR v. MOSELY.

ASSUMPSIT on a bill of exchange, dated 26th June, 1832, for 125*l.*, drawn by one Thorn on and accepted by the defendant, payable at four months after date, and indorsed by Thorn to one Valentine Knight, and by Knight to the plaintiff. Plea—Non-assumpsit.

Dec. 4th.

In an action by the indorsee against the acceptor of a bill of exchange, the bill appeared, on inspection, to have been altered in amount, and

after the acceptance were the words "at Cockburn's," which were not in the defendant's handwriting. Neither the plaintiff nor defendant gave evidence as to when or by whom the alterations were made:—*Held*, that it was for the jury to say, under the circumstances, whether the bill had been altered after acceptance, and that, if they thought it had, the plaintiff could not recover.

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It appeared that Thorn, the drawer, was a surgeon, who resided for some time in Sackville Street, but had gone to America about a year before. A witness was called, who had been his assistant; and he stated that he had two or three times seen blank acceptances of the defendant's in Thorn's possession.

Follett objected that the bills should be produced, that it might be seen whether they were in the defendant's handwriting or not.

Thesiger, contra, referred to *Gibson v. Hunter* (a), as an authority for receiving the evidence.

LORD LYNTHURST, C.B.—That case is not in point. The question here is as to the mode of proof (b).

Thesiger.—If the evidence is receivable, it must be receivable in a possible way of proof.

Follett.—It could not have been received in this way in *Gibson v. Hunter*, as the date of the bills is mentioned there.

Thesiger.—From the statement of the case, (which was a demurrer to evidence), it is clear that the bills were not produced; for it is said to have been proved by a witness, that Livesey, Hargreave & Co. "used to send down to the said Nathaniel Hingston blank bills of exchange for him to sign, as the drawer thereof, that many such blank bills were sent down together," &c.

(a) 2 H. Bl. 187.

(b) The marginal note of that case is, that, "on a demurrer to circumstantial evidence, the party offering the evidence is not obliged

to join in demurrer, unless the party demurring will distinctly admit upon the record every fact and every conclusion which the evidence offered conduces to prove."

Lord LYNTHURST, C. B.—I shall receive the evidence, and take a note of the objection. The witness says he believes they were the defendant's handwriting.

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The witness then said.—I saw the bills lying on the table; I did not take them up into my hand, but I can say, that, to the best of my belief, they were in the defendant's handwriting. I have seen Thorn take writing out of paper by a liquid (c); the paper was smooth, but very much discoloured. I have seen others write on the paper from which Thorn had taken off the writing. It does not run at all. You can write on it as well as you can on plain paper; but it is rather discoloured, and of a yellowish appearance. The words "one hundred and twenty five" appear a trifle darker than the other part of the bill; and the figure "five" appears a trifle darker also. The body of the bill and the figures are in the handwriting of Thorn. I never saw him discharge writing from bills of exchange. I have seen white of an egg applied to the paper, and afterwards the yellow colour was gone.

Knight the indorser proved that he gave value for the bill to a person named Hughes in July, and parted with it to the plaintiff for value in September, and that it was in the same state when he received it as now. The bill was in these words:—

" 26 June, 1832.

" Four months after date pay to my order one hundred and twenty-five pounds value received.

" James Thorn.

" Accepted, Payable at Messrs. Cockburn's, Wm. Mosely." Indorsed, " James Thorn, Valentine Knight."

The words, " accepted" " Wm. Mosely," were in the defendant's handwriting, but the other words " payable at Messrs. Cockburn's" were not. And it appeared that the

(c) The liquid was said to be chloride of soda.

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defendant had ceased to have an account there for some months before the bill was drawn.

Follett, for the defendant.—The plaintiff must be called. The words, “payable at Cockburn’s,” are not in the defendant’s handwriting. In *Macintosh v. Haydon* (*d*), which was since the statute, the addition of the words “payable at Ransom & Co., Bankers, London,” was held a material alteration. In *Tidmarsh v. Grover* (*e*), it was held, that where the drawer of a bill, accepted payable at Bloxam & Co.’s, after keeping it three or four years, indorsed it to the plaintiff, erasing the name of Bloxam & Co. and substituting Esdaile & Co., without the acceptor’s knowledge, Bloxam & Co. having failed since the acceptance, it was held that the plaintiff could not recover against the acceptor. It is incumbent on the plaintiff to shew when and how the alteration took place. The defendant cannot know any thing about it. The principle is, that an alteration, if material, must be accounted for by the party suing. *Henman v. Dickinson* (*f*) is an authority to that effect. In the present case, on the face of the bill the words are not in the handwriting of the defendant, and the plaintiff must prove how they came there.

Knight, the indorser, being asked by his Lordship, said that the words were there when he took the bill.

(*d*) 1 Ry. & Moo. 362. The drawer of a bill of exchange accepted generally, (after the 1 & 2 Geo. 4, c. 78), added the words “payable at Ransom & Co., Bankers, London,” without the knowledge of the acceptor, and then indorsed it for valuable consideration; the bill being overdue, and the indorsee privy to the alteration:—*Held*, that the acceptor was discharged.

(*e*) 1 M. & S. 735.

(*f*) 5 Bing. 183; reported also 2 Moore & Payne, 289. It decides, that, in an action by the indorsee against the acceptor of a bill of exchange, the date of which appeared to have been altered by the drawer after acceptance, it is incumbent on the indorsee to shew that the alteration was made previously to the indorsement, or before the bill was parted with by the drawer.

Follett.—That can make no difference. The words not being in the defendant's handwriting, the plaintiff must prove that they were put there by his authority. *Henman v. Dickinson* is quite in point. The Lord Chief Justice says—"But we are of opinion that where an alteration appears upon the face of a bill, the party producing it must shew that the alteration was made with consent of parties, or before the issuing of the bill." Mr. Justice Park also says—"Where the plaintiff sues on an instrument which has manifestly been altered, it is for him to shew that the alteration was not improperly made." The two first cases which I have cited shew that the alteration is material; and the last, that the onus of accounting for it lies on the plaintiff."

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Thesiger.—Had it not been for *Macintosh v. Haydon*, I should have ventured to argue, that, since the statute, the alteration was not material in an action against the acceptor. But, as probably your Lordship will be bound at *Nisi Prius*, by that case, which was not questioned, I will assume for the present that it was material. But there is nothing to shew that the words in question were not originally a part of the acceptance. It is for the other side to shew that the alteration was made after acceptance. An accommodation bill is not in circulation till it is in the hands of a holder for value; and the witness Knight says, that, when he got it, it was in the same state as it is now.

LORD LYNTHURST, C. B.—The words *at Cockburn's* are not the defendant's handwriting, and are not in such a position as that the defendant's signature authenticates them. It is for you to make out your case.

Thesiger.—In *Macintosh v. Haydon* there was proof of the alteration, and the plaintiff was a party to it. Here, the plaintiff was not a party to the alteration. It is in-

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cumbent on the acceptor, who seeks to invalidate his own acceptance, to shew that the alteration was not made with his authority.

Follett.—My point on the part of the defendant is, that he never accepted any bill payable at Cockburn's.

Lord LYNTHURST, C. B.—The question is, whether the defendant was a party to such a contract. The better way will be to reserve the point, and not stop the cause. According to the case of *Bishop v. Chambre* (g), it seems to be a question for the jury, if the plaintiff gives no account of the alteration, whether it was made after the note had become a perfect instrument in the hands of the payee.

Follett then addressed the jury for the defendant.—On the face of the bill it is clear that suspicion attaches to it, as the words "one hundred and twenty-five" are crowded in where there is not room for them, according to the nature of the handwriting of the other part; also, the bill is made payable at Cockburn's, when it appears, from the evidence in the cause, that the defendant for some months before it became due, and before it was drawn, had ceased to have any account there. Messrs. Cockburn's clerk says, the bill is in such a state, that, if it had been presented at their house, he should have looked to see if there was any erasure, and, if it had been written on an erasure, he would not have paid it. But this man Thorn, the drawer, from his knowledge of chemistry, had the means of adopting a different mode. You will say, whether this is not a forgery; and further, whether the plaintiff should not shew that it is not a forgery. The name "Cockburn's" is wrongly spelt, and evidently was not put there by the defendant; for he knew well enough

(g) 1 Moo. & Malk. 116, and ante, Vol. 3, p. 55.

how to spell the name of his own bankers; also, it will appear on inspection to be an attempt at imitation, and therefore it is not the defendant's.

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Lord LYNDEHURST, C. B. (in summing up) said—Undoubtedly, if this is Mr. Mosely's contract, he will be bound to pay the amount of the bill. Now, gentlemen, if you look at the bill, and if you attend to the evidence of the witnesses, you will find that there are some suspicious circumstances connected with the bill. The sum is compressed into too small a space; the words would have occupied a larger space if they had been written in the same handwriting as the other part. One question, therefore, will be, whether you think the defendant accepted the bill in its present state. But there is another point—the words “payable at Cockburn's” are not in the handwriting of the defendant, and you will have to say whether you think they were put after the acceptance was written, or before. [His Lordship read and commented upon the evidence, and proceeded]—It appears that Thorn, who was a medical man, was in the habit of making experiments by taking out writing on paper, and his assistant wrote upon the paper afterwards, and he says it looked as well as the bill in question. Also, a brother of Thorn's made experiments on bills of exchange, which after alteration looked as well as the present. The question, therefore, for your consideration, seeing that bills of exchange may be altered otherwise than by erasure, and there being the appearance of alteration upon this bill, will be, whether the bill was altered after the acceptance; for if it was, it will not be the defendant's contract, and he will not be liable upon it. I cannot do better than read what my Lord Tenterden, late Chief Justice of the King's Bench, said in a case which came before him. He said that it was a question for the jury “whether the note had been altered after it was made and delivered by the defendant, and so had become a perfect instrument; that it certainly lay on the plaintiff

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to account for the suspicious form and obvious alteration of the note. They were to judge from inspection of the instrument; and, if they thought the alteration was made after its completion, the verdict must be for the defendant." These are the words of my Lord Tenterden.—And, in the present case, I say, if you should think that the alteration was made after the acceptance, it will not be binding.

While his Lordship was addressing the jury—

Thesiger, for the plaintiff, elected to be nonsuited.

Nonsuit.

Thesiger and *Kelly*, for the plaintiff.

Follett and *Cowling*, for the defendant.

[Attornies—*J. W. Taylor*, and *Johnson & Wetherall*.]

(a) See the case of *Thompson v. Mosely*, ante, Vol. 5, p. 301.

BEFORE MR. BARON GURNEY.

(*Who sat for the Lord Chief Baron.*)

GREGORY v. TAVERNOR.

Dec. 6th.

If a room be continually used for the purpose of music and dancing, it will be for the jury to say whether it is not kept for those

purposes; and a room kept for drinking, music, and dancing, is within the stat. 25 Geo. 2, c. 36.

If a witness refresh his memory from entries in a book, the opposite counsel may cross-examine on those entries, without making them his evidence, and the jury may see the entries if they wish to do so; but if the opposite counsel cross-examine as to other entries in the same book, he makes them his evidence.

DEBT upon the stat. 25 Geo. 2, c. 36, for keeping an unlicensed room for music and dancing.

It appeared that the defendant kept a public-house in Gravel Lane, called *The King William the Fourth*, and

that there was a room in it from forty to fifty feet long, with a bar at one end, at which beer and spirits were served, and boxes at each side of the room; and that in the space between the boxes, on eleven different nights on which one of the witnesses was at the house, as many as fifty persons were dancing, while two persons played on violins, and a third on a bass, the musicians being seated on elevated seats.

One of the witnesses for the plaintiff referred to a book to refresh his memory as to the times at which he had been at the defendant's house, and as to what had occurred there.

Bompas, Serjt., cross-examined on these entries.

GURNEY, B.—Perhaps the best way would be to have the memorandum read.

Follett, for the plaintiff.—If it is read, it must be read as the defendant's evidence.

GURNEY, B.—The memorandum itself is not evidence; and particular entries only are used by the witness to refresh his memory. The defendant's counsel may cross-examine on those entries, without making them his evidence. The defendant's counsel cannot go into evidence of the contents of other parts of the book without making it his evidence; but he may cross-examine on the entries already referred to, and the jury may also see those entries if they wish to do so.

A witness from the Clerk of the Peace's Office proved that the defendant had no music licence.

J. Williams, for the defendant, submitted that this was not the case of a room kept for music or dancing, as it was manifestly a tap-room in a public-house.

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GURNEY, B., (in summing up).—It is not by any means necessary, to bring the present case within the act of Parliament, that the room should have been kept for the purpose of music or dancing only. If it was continually used for those purposes, it will be for you to consider whether it was not kept for them. A room may be kept for drinking, music, and dancing; but, if music was one of the purposes for which it was kept, it is a case within the act of Parliament.

Verdict for the defendant.

Follett, and *Mansel*, for the plaintiff.

J. Williams, *Bompas*, Serjt., and *Platt*, for the defendant.

[Attornies—*Begbie*, and *T. Humphrys*.]

In the ensuing term, *Follett* obtained a rule to shew cause why there should not be a new trial, on grounds not at all affecting the propositions of law above laid down.

BEFORE LORD LYNTHURST, C. B.

BURGESS v. CUTTILL.

Dec. 9th.

The stat. 3 & 4 W. 4, c. 42, s. 26, does not make the drawer of an accommodation bill a competent witness for the defendant in an action by the indorsee against the acceptor. The defendant, therefore, cannot examine him without a release.

ASSUMPSIT on a bill of exchange drawn by a person named Strallman on the defendant, and accepted by him, which bill had been indorsed to the plaintiff.

It appeared that the bill had been accepted by the defendant for the accommodation of the drawer.

Godson, for the defendant, proposed to call the drawer as a witness for the defendant.

Thesiger, for the plaintiff.—I submit that he is incompetent, on the ground of interest. He is interested, as being liable for all the costs.

Godson referred to the stat. 3 & 4 Will. 4, c. 42, s. 26(a).

LORD LYNTHURST, C. B.—I am of opinion that this is not a case within that act of Parliament, and that the witness is not competent without a release.

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The witness was released by the defendant, and was examined.

Verdict for the plaintiff.

Thesiger, for the plaintiff.

Godson, for the defendant.

[Attornies—*Hume & S.*, and *Lock.*]

(a) By which it is enacted, "That if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action, on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined, but, in that case, a verdict or judgment in that action in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him or any one claiming under him." And, by sect. 27 of

the same statute, it is enacted, "That the name of every witness objected to as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict or judgment shall be offered in evidence."

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Dec. 11th.

If a tenancy of a house be determined, and the tenant has promised to leave on a particular day, but afterwards refuses to do so, the landlord is not justified in putting the tenant's wife by force out of the house, and putting the tenant's furniture into the street; but if the tenancy be determined, and the tenant and his family be gone away and the house locked up, no one being in possession, the landlord would be justified in breaking into the house and obtaining possession.

HILLARY v. GAY.

TRESPASS for breaking and entering a room of the plaintiff, being parcel of a dwelling-house. There were also counts for expulsion, and for taking the plaintiff's goods. Plea—General issue.

It appeared that the house at which the trespass occurred belonged to the defendant, who had let it to a person named Jury, who had under-let a part of it to the plaintiff. It further appeared that Jury was under notice to quit at Midsummer, 1833, but that the plaintiff did not quit at that time, the defendant having distrained his goods in the month of August, 1833, for the rent due up to Midsummer: it was also proved that the plaintiff had said that he would not leave till he could suit himself, which would be within a fortnight; however, it appeared that after that fortnight the plaintiff did not leave; and the defendant procured a number of Irishmen to go to the house, and, after getting the plaintiff to go away, by sending a boy to tell him that his master wanted him, the Irishmen entered the plaintiff's room, and turned his wife out into the street, and put the plaintiff's furniture out at the window.

Thesiger, for the defendant.—I submit that this was no trespass in the defendant; he was the landlord, and the tenancy had expired, and he had therefore a right to resume the possession. In the case of *Turner v. Mymott (a)*, it was held that where a tenancy had determined,

(a) 7 Moo. 574. In that case the tenant of a house, after a regular notice to quit, had abandoned the premises and locked up the door, leaving only a few articles of furniture in the house:

the landlord after this (there being no person in the house) broke open the door and took possession:—*Held*, that he was justified in so doing.

the landlord was not a trespasser if he broke into the house.

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Lord LYNTHURST, C. B.—There the tenant had gone away and had not left his family in possession. The tenant was in that case out of possession, and no one was in possession. Where that is so, the landlord may enter if the term is at an end.

Thesiger.—In the case of *Taylor v. Cole* (b), it was held that the breaking was the gist of the action, and that the expulsion was merely aggravation.

Lord LYNTHURST, C. B.—How do you say the tenancy was put an end to?

Thesiger.—The tenancy terminated on Midsummer-day.

Lord LYNTHURST, C. B.—You distrain after that.

Ball.—There was also a disclaimer by the plaintiff.

A witness for the defendant stated, that he called on the plaintiff in July or August, 1833, and told him that it was an injury to his landlord that he should stay in the house contrary to his agreement; and that the defendant replied, that he would not go, as it was a comfortable thing to pay no rent, and that he would not leave for Mr. Gay, or Mr. Jury either.

Lord LYNTHURST, C. B. (in summing up).—Even if the plaintiff had promised to leave at a particular day, the

(b) 3 T. R. 292. In the case of *Taunton v. Costar*, 7 T. R. 431, it was held that a tenant holding over after the expiration of his term, cannot distrain the landlord's cattle which were put upon the premises by way of taking possession.

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conduct of the defendant is unjustifiable. There is no proof of any distinct promise of the plaintiff to go away at any particular time; but even if he had so promised, I am of opinion that the conduct of the defendant cannot be justified. If the defendant had a right to the possession, he should have obtained that possession by legal means.

Verdict for the plaintiff—Damages 50*l*.

Hutchinson, and *Follett*, for the plaintiff.

Thesiger, and *Ball*, for the defendant.

[Attornies—*Rosher*, and *Downes*.]

Adjourned Sittings in London, after Michaelmas Term,
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BEFORE MR. BARON GURNEY.

(*Who sat for the Lord Chief Baron.*)

ROLFE v. ABBOTT.

Dec. 12*th*.

To charge a father with the amount of clothes supplied to his son, it is essential that the clothes should have been supplied either with the assent of the father, or by his authority; and the father is the person to judge what is proper for his son.

ASSUMPSIT for a tailor's bill. Plea—General issue.

It appeared that Mr. Peter Christopher Abbott, who was the son of the defendant, had in the month of January, 1832, gone with Mr. Dixon, his friend, to the plaintiff, and ordered clothes, he being then between nineteen and twenty years of age; and Mr. Dixon stated, that he told the plaintiff that Mr. P. C. Abbott was the son of a very respectable gentleman who resided in Coram Street; but he stated in cross-examination that he had no authority from the defendant to introduce the son of the latter as a customer to the plaintiff. It further appeared, that Mr. P. C. Abbott held a situation in the Victualling Office, which produced him 90*l*. a year; and that the plaintiff had in the month of October, 1832, sent

a bill for these articles, debiting Mr. P. C. Abbott, and not the defendant. It also appeared, that the defendant had seen his son wearing these clothes.

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J. Williams, for the plaintiff, cited the case of *Baker v. Keen (a)*.

Kelly, for the defendant.—I submit that the plaintiff should be nonsuited. There is not only no evidence of the son being authorized by his father to buy these clothes, but there is direct evidence to shew that there was no authority. The father can only be charged if the articles were supplied on his authority, either express or implied.

GURNEY, B.—The case cited is very unlike the present.

W. H. Watson.—There are two other cases on this subject in *Carrington & Payne (b)*.

J. Williams.—The defendant knew that his son had the clothes; he saw him wearing them.

GURNEY, B.—I think that I ought to leave the case to the Jury.

Kelly, for the defendant, addressed the Jury.

(a) 2 Stark. 501. In that case the defendant's son, who had been a pupil at the Military College, was (he being still a minor) gazetted an ensign in the 98th regiment, and the plaintiff's claim was for articles which were proper for the son's outfit to India. The defendant lived at Dawlish. *Abbott, C. J.*, said, that "a father could not be bound by the contract of his son, unless either an actual authority were proved,

or circumstances appeared on which such an authority might be implied;" and his Lordship left it to the jury to say, "whether, under the circumstances of the particular case, there was sufficient to convince them that the defendant had invested his son with such authority."

(b) *Blackburn v. Mackey*, ante, Vol. 1, p. 1, and *Fluck v. Tolle-mache*, Id. p. 5.

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GURNEY, B., (in summing up).—The question in this case is, whether these clothes were supplied to the son of the defendant by the assent of the defendant. For, to charge him, it is essential that the goods should have been supplied with his assent, or by his authority. Indeed, if the law were not so, any one of you who had an imprudent son might have bills to a large amount at the tailor's, the hatter's, the shoemaker's, and the hosier's, and you know nothing at all about it. Did the plaintiff go to Coram-street, and ask the defendant if these things were furnished by his authority? Far from it. He delivers the articles without any intimation to the father, and in October sends in a bill debiting the son. The question for you to consider in this case is, whether the order for these goods was given by the assent or by the authority of the father. It is suggested that the defendant saw his son wearing these clothes; but when you find that the plaintiff, who knew where the defendant lived, never went to him, and never had any communication with him, can it be said that these articles were furnished by his authority? It is very important that tailors should not encourage extravagance in the young men of the present age, in the expectation that their fathers will be obliged to pay the bill. The father is the person to judge what is proper for his son; and, in this case, it ought not to be forgotten that the son was in a situation, from his having a salary, to be able to provide clothes for himself.

Verdict for the defendant.

J. Williams, and *Sir G. Lewin*, for the plaintiff.

Kelly, and *W. H. Watson*, for the defendant.

[Attornies—*Todd*, and *Rawlinson & W.*]

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BEFORE LORD LYNTHURST, C. B.

STEPHENS v. FOSTER and Another.

TROVER for bills of exchange. Plea—General issue.

On the part of the defendant, the deposition of a witness named Knowles, taken before Edmund Walker, Esq., one of the Masters of this Court, under a commission granted in pursuance of the stat. 1 Will. 4, sess. 2, c. 22, s. 4, was read. The witness was examined before Master Walker by Mr. Johnson; and cross-examined by Mr. Perring.

In his examination in chief, the following passages occurred:—"Knows Mr. Wood of the firm of Wood & Poole, bill-brokers. Mr. Wood told witness at the time the bills were delivered to him the number, which was about sixty. Mr. Wood then went away. Witness counted the bills immediately after Mr. Wood left, and found one more than the number mentioned by Mr. Wood."

In the cross-examination, the following passages occurred:—"Witness was examined by Mr. Field. The paper writing marked with the letter A. was produced to the witness; the signature to which the witness stated to be in his hand-writing. The declaration in that paper was made by witness to Mr. Field, as the solicitor under the commission of Wood & Poole. The paper produced purports to be a declaration of what took place respecting those bills on Saturday the 19th, and Monday the 21st, of November, 1831. It is there stated, at the foot of that memorandum or declaration, that witness did not make any list of them, or examine them on either occasion. In answer to a question by Mr. Perring [who cross-examined the witness before Master Walker] to the witness, how he reconciles his declarations therein, that he did not examine the bills either on Saturday or Monday with his statement on the present occasion? Witness

Dec. 17th.

A witness for the defendant was examined on a commission granted under the stat. 1 W. 4, sess. 2, c. 22, s. 4; on his cross-examination a paper signed by him was produced to him, and a portion of his cross-examination and re-examination related to it and was founded on it. The paper was annexed to the deposition:—*Held*, that this paper was not to be read as a part of the cross-examination of the witness, but that, if the plaintiff's counsel wished it to be read before the cross-examination was read, it must be read as his evidence, so as to entitle the defendant's counsel to observe on it in a special reply.

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answered, that he does not consider that declaration refers to the Saturday; but that it was most likely in answer to some other question asked by Mr. Field. Witness has no other answer to give to the last question." The deposition went on to state, that, "in his re-examination, the witness said, that, at the time the witness signed the paper marked A., Mr. Field asked such questions as he liked, and took down such answers as he chose, and had no doubt that the last part, which related to his examining and making a list of the bills, was an answer to some other question, which did not appear in the statement A."

The paper marked A. was annexed to the deposition returned by Master Walker, and was as follows:—

"I received a parcel of bills on Saturday the 19th of November from Mr. Foster, about four o'clock, which I saw Wood bring, and I kept them to be put into the iron safe by Mr. Foster's brother in the evening. I got those bills from the iron safe in the morning about nine o'clock, and gave them to Mr. Foster late on the day, I believe, in the evening. I think, by six o'clock, Wood brought a bundle of bills, and said they were what he had taken away in the morning. I received the bills and put them in the iron safe; I did not make any list of them, or examine them on either occasion.

" 6th Jan. 1832.

Richard Knowles.

"The above was taken down from Mr. R. Knowles' dictation, and he signed it.

" E. W. S."

Bompas, Serjt., for the plaintiff, wished that the paper marked A. should be read as a part of the cross-examination of the witness, as it was referred to in it.

Wilde, Serjt., contra.—That would be contrary to all the practice where examinations have been taken on interrogatories.

Lord LYDNHURST, C. B.—In Courts of equity, where the evidence is entirely on depositions, the practice is, where a witness for the plaintiff proves a document on his cross-examination, to read that document as the defendant's evidence. If my Brother *Bompas* wishes the paper marked A. to be read now, it shall be done; but, if it be, it is to be considered as his evidence, and I shall allow my Brother *Wilde* to reply upon it.

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The paper was read, and *Wilde*, Serjt., observed on it in his special reply.

Verdict for the defendants.

Bompas, Serjt., *Crompton*, and *Dayman*, for the plaintiff.

Wilde and *Coleridge*, Serjts., and *R. V. Richards*, for the defendants.

[Attornies—*Lane & Co.*, and *Dennett & Co.*]

IN the ensuing term, a rule to shew cause why there should not be a new trial was granted, but on grounds not at all affecting the point above mentioned.

As to the practice in examining witnesses under the stat. 1 Will. 4, sess. 2, c. 22, s. 4, see Chitty's ed. of Arch. Prac. in K. B. &c., Vol. 1, p. 249.

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COURT OF KING'S BENCH.

*Adjourned Sittings at Westminster after Hilary Term,
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BEFORE LORD CHIEF JUSTICE DENMAN.

Feb. 7th.

REX v. MEDLEY and Others.

In an indictment against a Gas Company for a nuisance, in conveying the refuse of gas into a great public river, whereby the fish are destroyed, and the water is rendered unfit for drink, &c., the question for the jury is, whether the special acts of the particular company complained of amount to a nuisance.

The circumstance, that, by the diminution of fish, a considerable number of fishermen are thrown out of employ, is not of itself sufficient ground to sustain such an indictment.

The directors are answerable for an act done by their superintendant and engineer, under a general authority to manage the works, though they are personally ignorant of the particular plan

adopted, and though such plan be a departure from the original and understood method, which the directors had no reason to suppose was discontinued.

INDICTMENT against the chairman, deputy chairman, and others of the directors of the Equitable Gas Company, and several persons employed by them in the carrying on of the works, for a nuisance. The *first* count stated in substance, that, from time whereof the memory of man runneth not to the contrary, there had been and still was a certain ancient river called the Thames, &c., furnishing and affording wholesome water for the drink, &c. of the inhabitants near it, and producing an abundant supply of fish for their food, and also furnishing useful labour and employment to very many fishermen; and that the defendants, well knowing the premises, on the 10th of October and at other times, on certain premises occupied by some of them, did from certain substances produce great quantities of a certain fluid and vapour called gas, and of coal tar and coke, and unlawfully and injuriously conveyed and caused to be conveyed, by divers pipes, &c., great quantities of filthy, noxious, unwholesome and deleterious liquids, matters, scum, and refuse, resulting from the making of the said gas, &c., from the aforesaid premises into the said river Thames, whereby the waters became charged and impregnated with the said liquid, &c., and became corrupted and insalubrious, and unfit for the use of his Majesty's subjects; and the fish in the river were greatly destroyed and diminished in number, and his Majesty's subjects were deprived of the use of them for food, and very many indus-

trious people, who supported themselves and their families by catching and selling fish, were deprived of their employment, and reduced to great poverty and distress; to the common nuisance and grievous injury of his Majesty's subjects, to the evil example &c., and against the peace &c.

The *second* count was similar, except that it omitted the injury to the fish and the fishermen, and confined the allegation of injury to the corrupting of the water, and rendering it unfit for drink, &c. The *third* count was for destroying and diminishing the number of fish, and depriving the King's subjects of them as an article of food. The *fourth* count was for conveying, and causing and suffering to be drained and conveyed, great quantities of noisome and offensive liquid matter, &c., produced from the making of gas, from certain premises into the stream and water of the Thames, to the great damage and common nuisance of all the King's subjects, &c. The *fifth* count was similar to the first, except that it omitted the words "coal tar and coke," and also the allegation that the premises were used and occupied by some of the defendants. The *sixth* count was similar to the second, with the omissions in the fifth. The *seventh* count was similar to the third, with the same omissions as the fifth and sixth. The *eighth* count omitted the introductory allegations, and charged the defendants with having *conveyed*, and caused and procured to be conveyed, *by pipes, &c.*, certain noxious liquids, produced by the making of gas, into the river, &c. The *ninth* count also omitted the introductory allegations, and charged the defendants with having *caused*, procured, *permitted, and suffered* great quantities of filthy and deleterious liquids, &c. to *run and flow into* the river, &c.

The defendants pleaded not guilty.

Campbell, S. G., for the prosecution.—It is the duty of persons so to conduct their works as that no part of the gas shall be allowed to escape into the river, so as to corrupt the water. This is not the first instance of an indict-

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ment against a gas company for a nuisance. It is charged as a nuisance in two ways: The Thames is used for supplying the public with water for domestic purposes, and the persons who corrupt it are clearly punishable for a nuisance. Another ground is, that there was a fishery established, in which large quantities of salmon and other fish were caught, which employed a great many fishermen. The gas kills the fish and extinguishes the breed, and throws the fishermen out of employ. The indictment is against some of the directors and some of the workmen. The works, we apprehend, are carried on by order of the directors, and consequently they are liable. In the case of a newspaper, the proprietor is responsible for what appears in his paper. There is no particular law with respect to newspapers. It proceeds on the principle that a person is liable for what is done under his presumed authority.

On the part of the prosecution, Mr. Nelson, assistant to the water-bailiff of London, was examined as a witness. He stated, that, in consequence of complaints made to him by the fishermen, in May 1832, he went in his boat along the river from Westminster to Millbank; and when he arrived near the defendant's premises he saw thousands of dead fish, and a quantity of stuff floating on the surface of the water, which he described as "nasty stuff fit to poison a horse;" that he had traced it as far as Hungerford Market; that at low water it was a sediment at the bottom of the river, and on the keels of boats, &c. He further stated, that he had in numerous instances since seen large quantities of dead fish floating on the water near the gas works, and also that the number of fish was diminished, and many fishermen were thrown out of employ. He admitted, on his cross-examination, that the number of fish had been diminished more than twenty years before; but stated that he did not think the increased navigation of the river had contributed to such diminution, and that he considered the increase in the number of sewers as affording additional food for the sustenance of the fish. In answer to

questions from the jury, he said, “ I do not know that any of the other gas companies have pipes into the river. We made the City companies take up their pipes about a year ago.” It was also proved, that, in November, 1832, some of the assistant water-bailiff’s men went for the purpose of ascertaining how the stuff found its way into the river, and they discovered that it was pumped from the premises of the Equitable Gas Company, and conveyed through a hose pipe into a sewer adjoining the works, which sewer ran into the river. One of them said, in describing it, that it was running about a ton a minute, and “ smelt ready to knock any body down (*a*).” Several fishermen and others proved the injury done to the fish. One of the fishermen said, “ In October, 1832, I saw the gas floating on the water; it came out from the sluice at the gas-house, so as I could hardly get my breath. I had taken fish higher up and put them into my well; when we got near the place the fish began to fly about as they do when they are in a dying state; we rowed across the river into clear water, and found some dead, but the rest I sold (*b*).” Several witnesses also proved that the gas rendered the water unfit for drink, &c. From the evidence of the secretary and some of the persons who had been in the employ of the company, who were called to fix the several defendants, it appeared that the company was established in 1830, and began to supply gas in 1831; that the defendant Medley, was chairman; the defendant Treherne, deputy chairman; the defendant Leadbeter, the superintendant; the defendant Hines, the gas engineer; and the defendants Bell and Simmons, clerks in the establishment;—that an endeavour was made to consume the refuse gas by evaporation, which failing, the plan complained of

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(*a*) A sample of it was produced in Court, and fully justified the witness’s statement.

(*b*) One of the fishermen, to prove the injury to the fishery, said—“ Ten years ago, I could sit

at the mouth of that sewer a few hours, and catch six or seven shillings’ worth of fish; but now, you may sit there for a fortnight and not catch half a one.”

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was adopted. The secretary stated on his cross-examination that he believed *the directors had not the slightest idea* of the new mode adopted, but left it all to the management of Leadbeter, who directed Hines the engineer, who gave orders to the rest of the workmen. He also stated, that, from the improved state of the works, the acts complained of were not likely to occur again. A prospectus was put in, in which the directors referred to the great experience of Mr. Leadbeter as a pledge for the proper management of the works.

Mr. Goldham, the yeoman of the water side, proved the diminution in the number both of fish and fishermen (a). On his cross-examination he admitted, that he said before a committee of the House of Commons that the additional sewers and the increase of copper-bottomed vessels injured the fish; and that he had said on a former trial, that he attributed the impurity of the water to other nuisances, but chiefly to the gas. He swore distinctly that he considered the gas as the principal cause.

Sir *J. Scarlett*, for the defendants.—In reason and justice the defendants ought not to be convicted. A mode of consuming by evaporation the noxious matter complained of, is proved to have been used from the very first establishment of the works, and it seems that the plan of using the pipes and hose was rendered necessary from some imperfection in the machinery. If it had not been

(a) In answer to questions from the jury, he said, that, with respect to the bad fish brought to Billingsgate, if there is a large quantity, it is sent down to Sea Reach, and turned over at the top of the tide; if a small quantity, it is thrown into the river. It is a curious fact, authenticated by affidavit, in the case of *Rex v. Old*, which was an indict-

ment for selling unwholesome fish, that the quantity of putrid and unwholesome fish sent to Billingsgate, and seized by the officer of the corporation, in the year 1831, was 138,206, and in 1833, 163,584, exclusive of periwinkles, muscles, shrimps, and other small fish, of which there were many hundred bushels and gallons.

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adopted, the company must have ceased for a time to light the district. The occasional use of the plan under these peculiar circumstances will not constitute a nuisance, though, if it had been persisted in, and carried on habitually, it might. It seems that the directors did not know of what had been done till the discovery was made. It was only an expedient resorted to by the workmen, and from the improved state of the works will not occur again. As to what the fishermen say, it must be recollected that there were other gas works besides those of the defendants. For it seems that the City, about a year ago, made those companies take up their pipes. The prosecutors have failed in shewing criminal participation on the part of the directors in the act done. A director, who only goes occasionally to the works, and does not interfere in the management of them, is not answerable criminally for the conduct of the workmen. But I do not deny, that, if what has been proved is a nuisance, the defendant Hines is guilty, because he was the gas engineer. In considering what is or is not a nuisance, a jury must take into consideration the whole of the circumstances and consequences. If it can be shewn that the comfort and security of society are much promoted by particular works, it would be absurd to say that the poisoning of a few fish was a thing not to be tolerated. Steam-boats agitate the water, and stir up the soil, and tend to destroy the fish. Copper-bottomed vessels also are injurious. Sewers also, while they cleanse the houses, may make the water impure into which they run. I remember a trial at bar in the Court of Exchequer, when Lord Chief Baron Gibbs presided there. It was an indictment instituted by the Admiralty, with respect to the walls of the harbour at Dover, which it was argued created a nuisance; and I then successfully contended that a harbour would be useless without walls. That case was decided on the principle laid down by Lord Hale, when treating of maritime nuisances. If the diminution of fish is to be considered the criterion, then every proprietor of a copper-bottomed vessel, every maker of a sewer,

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every proprietor of a steam-boat, must be found guilty, as they contribute to such diminution, and it is not a question of degree. Gas works must of necessity be established near to the places which they are to light. It is matter of sound reason and good policy to have these things which are advantageous to the public. The count as to the corruption of the water is not proved, as the gas impregnated only a part. One witness rowed over to the other side, when his fish began to jump about, and he found the water there was pure enough. A small quantity being impregnated does not shew that the whole stream is to be considered as poisoned. Besides, the contents of the sewers are enough to render it impure. As the people of England are resolved to have gas-lights and steam-boats, and copper-bottomed vessels, they must be content also to bear the inconveniences which will occasionally result from the use of them. There is no evidence that the water used for drinking is made worse by this particular nuisance, and, therefore, that part of the case is not established. And on the whole, assuming what was done to be a nuisance, there is no evidence that it was carried on systematically. On the contrary, it is proved that it was the effect of accident, and only occasional.

DENMAN, C. J., in summing up, said :—This is an indictment which charges the defendants with conveying by certain pipes into the river a certain deleterious ingredient, whereby the waters were corrupted and rendered unfit for human food, and, also, whereby the fish were diminished in number, and the fishermen thrown out of employ. With respect to the fishermen being thrown out of employ, I ought to lose no time in informing you, that will not of itself be ground for an indictment, as, if it were sufficient, every successful speculation in trade might be the subject of a prosecution. The question of what is a nuisance is, as is evident, a question for the jury in each particular case. The words of the indictment convey the law upon the subject as well as any person sitting here can do.

The question will be, whether there has been a noxious and deleterious ingredient conveyed into the river, whereby the water has been corrupted and rendered unfit for use; and if there has been, then whether, in the concluding words of the indictment, it was to the common nuisance of the King's subjects. If you think that this has been done, and that it was conveyed from the premises of the defendants, then you will find them guilty. The diminution of the number of fish took place before this establishment, and there were also other causes contributing to it. The second question you will have to consider will be, which of the defendants are guilty of the nuisance. As to Hines, if you are satisfied that a nuisance has been committed, no doubt you must find him guilty. It is said that the directors were ignorant of what had been done. In my judgment that makes no difference; provided you think that they gave authority to Leadbeter to conduct the works, they will be answerable. It seems to me both common sense and law, that, if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants. It is quite clear, that in great rivers of this sort there must be many inconveniences, arising from a variety of causes; and the question, therefore, will be, whether there has been produced by the special acts of this company that which you consider to amount to a nuisance. With respect to copper-bottomed vessels, it seems to me that a great number of trifling objects may produce a deleterious effect, though the individual instances may not be the subject of indictment. In the present case, you will say whether these particular individuals have done an act to the common nuisance of the King's subjects.

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Verdict—Guilty, against the chairman, deputy chairman, superintendant, and engineer; and not guilty as to the other defendants.

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Campbell, S. G., Law, Recorder, Mirehouse, C. S., Follett, and Bullock, for the prosecution.

Sir J. Scarlett, Adams, Serjt., and Kelly, for the defendants.

[Attornies—*W. L. Newman, and Baker & Hodgson.*]

June 6th.

A MOTION for judgment on the parties convicted was made in the course of Trinity Term (a), before Lord Denman, C. J., *Littledale, Taunton, and Williams, Js.*

Affidavits were read from the defendants, Medley and Treherne, in which they stated that no complaints had been made to them at any time respecting the management of the works, nor were they at all aware of the nuisance complained of until the indictment was preferred; and all four defendants swore that the nuisance had been wholly abated by the establishment of an adequate system of evaporation.

Sir J. Scarlett, Adams, Serjt., and Kelly, were heard in mitigation; and *Campbell, A. G., and Bullock*, in aggravation of punishment.

LITTLEDALE, J., in giving judgment, said—The Court have to pronounce judgment in this case of the King against William Medley, Edmund Treherne, Richard Leadbeter, and Edward Hines, for a nuisance; which is stated to have been committed by conveying very large quantities of noisome liquids, arising from the manufacture of gas, into the river Thames, whereby the water was rendered insalubrious and the fish destroyed. It has been proved, that the water was not only rendered improper for domestic purposes, but that a great quantity of

(a) The personal attendance of the defendants was dispensed with by consent.

fish was actually destroyed by being poisoned. Now, we think, under all the circumstances, that this is not a matter to be passed over merely by the infliction of a nominal fine. At the same time, as no complaint has been made since this indictment was preferred, we do not think it necessary to visit the offence of these defendants with severe punishment. Under all the circumstances of the case, the Court doth adjudge that the defendants, William Medley and Edmund Treherne, the one being the chairman and the other the deputy-chairman of this company, which is called "The Equitable Gas Company," do pay a fine of 25*l.* each to the King; and that the other defendants, Richard Leadbeter and Edward Hines, the one the general superintendant of these gas-works, and the other the engineer, having also some part of the direction of the works confided to him, do each of them pay a fine of 10*l.*

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Adjourned Sittings in London after Hilary Term, 1834.

BEFORE LORD CHIEF JUSTICE DENMAN.

DOE *d.* PILE *v.* WILSON and Another.

Feb. 13th.

EJECTMENT to recover possession of certain property in Whitecross-street, London.

A. made a will containing these words:—"I leave and bequeath unto the

said William George Lister all the property, freehold, leasehold, and of whatever description I am possessed of or have claim to:"—*Held*, that that was a bequest of all A.'s estate, whatever it was; and that A. being possessed of the fee, it was a bequest of such fee, and not of an estate for life merely.

In ejectment, the defendant's counsel has no right to the general reply, unless he admits the whole *prima facie* case of the lessor of the plaintiff. Therefore, where the counsel for the defendant only admitted the pedigree of the lessor of the plaintiff, and his counsel proved the seisin of the ancestor, by receipt of rent, which case was answered by setting up a will, the validity of which was disputed by evidence on the part of the lessor of the plaintiff, it was held that the defendant's counsel was not entitled to the general reply.

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When a witness for the lessor of the plaintiff had been sworn, and was proving the pedigree—

Moody, for the defendants, admitted that the lessor of the plaintiff was heir-at-law of Catherine Lister, who was the daughter of William Betteridge.

Proof was then given of the payment of rent to William Betteridge in his lifetime, and, after his death, to his daughter Catherine. She married William George Lister in 1824, and died on the 29th of August, 1826, having first made her will—the power of doing so having been reserved to her under her marriage settlement. It was stated on the part of the lessor of the plaintiff, that Mrs. Lister was not, at the time she made the will, in a state to understand what she was doing.

Moody, for the defendants.—The defendants claim under a will of Catherine Lister, who made it under a settlement on her marriage. If the lands are vested in trustees under the settlement, the heir will be defeated, unless he can shew that the trustees assigned to him. The plaintiff's attorney has written letters, admitting that there was a power under the settlement for the deceased to make a will; but saying, that the question would be, whether she was in a state of mind to make one. The plaintiff's attorney has admitted that he was in possession of the settlement, and we have given notice to produce it.

DENMAN, C. J.—You do not seem to have any evidence of the settlement. Can I take the statements in the letters? It is only the opinion of the attorney on a point of law.

F. Pollock said he would produce the settlement.

DENMAN, C. J. — Then it will come to a question as to her competency to make a will.

F. Pollock assented.

It appeared that two of the three subscribing witnesses to the will were dead. The surviving one was examined, and stated that he heard the will read to the deceased; that she was perfectly satisfied, and said, “that will do;” that he went for Dr. Porter, and when he came back the will had been removed; that he saw her write her name, and the other two witnesses were present; that she was in bed; that he was a lodger in the house, and remained there two days after, and when he left she was getting better. The witness added, that, to the best of his belief, she was in a sound state of mind; that he conversed with her the day previous to the signing of the will, and several days before; that she was subject to fits, but when she recovered she was perfectly sensible; that she let him the apartments and received the rent. On his cross-examination, he admitted that it was in the night when the will was signed; and that he was called out of bed to see it executed.

The settlement and will were read; the latter was as follows:—“I, Catherine Lister, wife of William George Lister, of the Rose public-house, make this my last will and testament, revoking,” &c. “I leave and bequeath unto the said William George Lister all the property, freehold, leasehold, and of whatever description, I am possessed of, or have claim to; and I appoint the said William George Lister my executor.”

F. Pollock, for the plaintiff.—There are no words of inheritance, and, therefore, it is only a life estate.

Moody and *Tyndale* referred to *Sharp v. Sharp* (a).

(a) 4 M. & P. 445; 6 Bing. 630. queathing pecuniary legacies to his children, devised to his widow the

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DENMAN, C. J.—I think that it will do. I think it conveys all her interest in whatever she was possessed of.

It appeared that William George Lister died in May, 1832.

Mr. Porter, the surgeon, who was fetched by the subscribing witness to the will, as mentioned in his evidence, was called and examined on the part of the lessor of the plaintiff. He stated, that he attended Catherine Lister first on the 19th of July; that he found her labouring under severe determination of blood to the head and low spirits; that he saw her again on the 5th of August, when he found her labouring under a strong epileptic fit; that he saw her every day, and sometimes twice a day, till she died on the 25th; that she died in consequence of injury done to the head by that fit; that, to the best of his opinion, she was not at any time after the 5th of August in a fit state to make a will; that he attended her on the 9th, the night the will was made, and his attention was called by a nephew of Mr. Lister's to her competency to make a will, and he gave his opinion then that she was not competent; that she injured her tongue on the 5th of August, and that he never saw her out of bed or heard her speak distinctly after that time. On his cross-examination, he said, I have no reason to think I did not make myself understood by her. During the first few days she was in a state of insensibility. I do not think it possible she could say, "Very well, that will do;" her tongue was swollen and sloughed. I examined the body after death, and found she had suffered materially from congestion. Her death was occasioned by effusion on the brain. I think

whole of his remaining property in the Bank of England or otherwise, and also a freehold house in S., a freehold estate in R., a copyhold estate in B., and a leasehold es-

tate in A., with all right and title to the same; and it was held that the widow took a fee in the freehold, and a customary fee in the copyhold.

there must have been a fit just before she died. Nine or ten days is the least time for the effusion to have been there. In answer to a question from the Chief Justice, he said, I desired her to shew her tongue, and she opened her mouth occasionally.

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F. Pollock stated that he had evidence of declarations made by Catherine Lister as to the conduct of her husband to her, but not made in his presence.

DENMAN, C. J.—I think they are not evidence, especially if they were not made at the time of her signing the will.

F. Pollock stated that they were not made at that time, and therefore withdrew them.

Moody, for the defendants, claimed the general reply, as he had admitted the pedigree of the lessor of the plaintiff. He relied on *Goodtitle* dem. *Revett* v. *Braham* (a), as an authority precisely in point.

F. Pollock.—That case is universally considered in Westminster Hall as mis-reported; and has never been acted upon since.

DENMAN, C. J.—I do not find any report that the case has been overruled, or that a contrary proceeding has been adopted.

(a) 4 T. R. 497. That was a trial at bar. The report of the case, as to the right of reply, is very short. It is as follows:—“The lessor of the plaintiff claimed as the heir-at-law, the defendant as the devisee, of Mrs. Elizabeth Braham, the person last seized. At the outset of the cause a question arose, who was entitled to the general reply; and the

Court decided, that, if the plaintiff proved his pedigree, and stopped, and the defendant set up a new case, which the plaintiff answered by evidence which ultimately went to the jury, the defendant should have the general reply; and Buller, J., said that he had so ruled it in a cause at Winchester.”

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Sir *J. Scarlett*, as *amicus curiæ*.—According to my experience, the practice is not in accordance with the case of *Goodtitle v. Braham*. My impression is, that the defendant must admit the whole *primâ facie* case of the lessor of the plaintiff, before he can be entitled to the general reply.

Campbell, S. G., expressed a similar opinion.

Moody.—*Goodtitle v. Braham* is a case in banc; and has not been overruled.

DENMAN, C. J.—I do not much rely on any decision in banc on such a point; because I believe it is always said in banc that these points of practice are for the discretion of the Judge at Nisi Prius; and I think the Judges in banc would be very slow to interfere with the ruling on such a point, unless it was a surprise. I am anxious to act on the general understanding at Nisi Prius. My impression is most clearly, that the defendant does not acquire the right to begin, unless he admits all up to a certain point. But, if he does that, I think he is entitled to begin, and to have the reply. But otherwise not; and I cannot say that I think that has been done in this case.

Moody then addressed the jury, and contended that the evidence was very weak; and, if it were satisfactory, no sick person could ever make a will. The medical man only gives his opinion, and my evidence is of facts. Bodily weakness is not inconsistent with mental power. The circumstance of her signing her name is sufficient to shew that she was not insane. The state of her tongue was sufficient to account for her not speaking.

It appeared, on inspection of the settlement and lease for a year, that the signature was Catherine, with an *e*; and, on inspection of the will, it appeared that, both in

the body of it and the signature, the word was spelt with an *a*, making it Catharine.

F. Pollock, who discovered this, in the general reply, relied upon it, as shewing that some person's hand must have directed that of the deceased in signing the will. He also urged the suspicious nature of the transaction, arising from the time of night, the absence of any attorney, medical man, or relation, and also of proof of any directions for the preparation of the will. She was not in a situation to speak, and therefore she could not give directions to have the will prepared; and, if the will was not prepared from directions by her, it is not her will. The policy of the law is against a will made *in extremis*. In a part of this United Kingdom (*a*) a will is not valid unless the person subsequently does some public act, such as appearing at church or at market, to prevent what I contend it is evident has been done here. It is for the defendants to satisfy you affirmatively that the will was properly made. If there are grave doubts and suspicions on the case of the defendants, then the heir-at-law is entitled to the verdict.

DENMAN, C. J., in summing up.—The lessor of the plaintiff is entitled to your verdict, unless you are satisfied that this will was duly executed. His Lordship read over the evidence, and said—The question is, whether it is the will of Catherine Lister? Whether you are satisfied that she executed it, having a disposing mind? If you think that, after it was read to her, she gave her assent to it, and signed it, it will be sufficient; but, if you think it is left in doubt on the evidence, whether her mind went along with the will or not, then, as the mind makes the will, it will not be her will.

The jury retired to consider their verdict; and while

(*a*) Scotland.

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they were out, *Comyn*, for the lessor of the plaintiff, requested his Lordship to reserve the point as to the creation by the will of a life estate merely.

DENMAN, C. J.—I cannot see any harm in reserving the point; not from any doubt, but to save expense to the parties (*a*).

Verdict for the plaintiff.

F. Pollock and *Comyn*, for the lessor of the plaintiff.

Moody and *Tyndale*, for the defendants.

[*Attornies—Fuller & S., and Yeates.*]

(*a*) The verdict would, of course, render any application on this point unnecessary.



Feb. 14th.

READ, a Pauper, v. AMBRIDGE.

The question in an action for words is not what the party using them considered their meaning, by any secret reservation in his own mind, but what he meant to have understood as their meaning by the party to whom he uttered them.

SLANDER.—The declaration stated in substance, that the defendant, in conversation with one Collins, said to him of the plaintiff, “Do you know that you are extremely wrong for putting that damned thief’s name, Bill Read, into your window; he is the most blasted thief in the world, and ought to have been hung with his aunt years ago. You may tell him from me, that he is a bloody thief, and I can prove it; and he ought to be hung. He robbed Mrs. Read, and I can prove it; and he ought to be hung.” The declaration averred that the defendant meant to insinuate and have it understood, that the plaintiff had been guilty of felony. There was also an allegation, that Collins ceased to deal with the plaintiff in consequence of the words spoken.

Collins was called as a witness; and from his evidence it appeared that the plaintiff carried on the business of a pork butcher, in White Cross-street, in the city of London,

and a Mrs. Read, a relative of the defendant, carried on the same kind of business in the same street. Collins had put in his shop window a bill, notifying that the plaintiff had removed to a house which was nearer to the shop of the defendant's relation. It was upon the defendant's seeing this bill, that the words stated in the declaration were uttered. They were in substance proved; with the addition, that the defendant said, pointing to the house of his relative Mrs. Read, "that there was not a bit of apparel which the plaintiff's family wore, which he had not robbed that poor woman of." It further appeared, that the aunt alluded to was a Mrs. Hibner, who had been hanged for the murder of her apprentice by starvation. Collins swore, that he believed from what the defendant said, that the plaintiff had been guilty of something bad. He believed him guilty of stealing something, but he did not know what.

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Moody, for the defendant, submitted that it was evident that the words arose out of the rivalry in trade between the plaintiff and the defendant's relative; and that the defendant merely intended to convey the impression that the plaintiff had robbed Mrs. Read, by taking away her business from her, and did not intend to charge any specific act of theft. He also contended, that the defendant could not mean that the plaintiff should be hanged for thieving, because he had coupled his name with that of his aunt, Mrs. Hibner, who was not hanged for stealing, but for the crime of murder.

DENMAN, C. J., in summing up, told the jury, that the first question for their consideration was, whether they thought the words shewed an intention to impute felony. His Lordship, *inter alia*, observed—It is said that the words evidently meant, that the plaintiff had robbed Mrs. Read by injuring her in trade. But, if the defendant meant to convey that meaning, it seems to me he should

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have used very different words. It is not enough that he had some reservation in his own mind. The question is, what he meant to make other people believe; whether he meant to have it understood by others that the plaintiff had committed felony. It is said that the defendant did not mean to charge any specific act of theft, nor is it necessary that he should. A man may call another "thief," without meaning to state any specific charge, for which he might be indicted and tried. It is said also, that the defendant could not intend to charge the plaintiff with stealing, because he said that he ought to be hanged with his aunt, who was not hanged for theft but for murder. I am of opinion that persons are not bound to draw such nice distinctions. Persons are not bound to carry the Newgate Calendar in their head, and to know what particular crimes particular individuals were guilty of. His Lordship read over the evidence, and left it to the jury, who found a verdict for the plaintiff—

Damages one farthing.

Dunbar and Mansel, for the plaintiff.

Moody, for the defendant.

[Attornies—*Warren and Nickson*.]

Feb. 15th.

TURNER v. PYNE.

A. had given a cognovit for 37*l.*, payable by monthly instalments; but if default was made in payment of any instalment, judgment was to be entered up for the whole 37*l.*, or so much as remained due; and B. agreed that A. should attend at the office of C. on the seventh day after "any notice," so that if any of the instalments were not paid, A. might be taken on a ca. sa. The first instalment was not paid, and judgment was entered up for the whole sum, and a ca. sa. sued out. Notice was given to B. for A. to attend at C.'s office at a certain time. A. did so, but C. gave him a week's time:—*Held*, that this was a complete performance of B.'s agreement, and that, if, after this, another notice was given for A. to attend on another day, and A. did not attend, no action would lie against B.

ASSUMPSIT on the following agreement:—"Between William Turner, plaintiff, and Thomas Manning, defen-

dant.—In consideration of the above-named plaintiff allowing the above-named defendant time for the payment of the debt and costs in this action, amounting in the whole to the sum of 37*l.*, and also in consideration of the said plaintiff accepting from the said defendant a *cognovit actionem*, bearing date herewith, for the payment of the debt and costs, by the monthly instalments of 5*l.* therein mentioned, I, the undersigned, do hereby undertake and agree to and with the above-named plaintiff, that the said defendant shall personally attend at the office of Messrs. Dover & Lawrence, in Great Winchester-street, Broad-street, in the City of London, within seven days after *any* notice requiring such attendance shall be given to me or left at my office; and I hereby undertake and agree that the said plaintiff shall be at liberty to name in such notice, if he pleases, the seventh day, at the hour of two o'clock in the afternoon, for the attendance of the said defendant at the place aforesaid, so that, in the event of any of the said instalments of the 5*l.* mentioned in the said *cognovit* not being previously discharged, a writ of *capias ad satisfaciendum*, to be issued on the judgment to be entered up on the said *cognovit*, may be duly executed; and in default of the said defendant attending at the place and time in the manner stipulated, I undertake to pay the said debt and costs, and all subsequent costs to be occasioned by the non-payment thereof, or any of the instalments thereof as aforesaid. And I make the undertaking absolute; it being the intention thereof, that, in the event of the said defendant being from any cause privileged or protected from arrest at the time to be mentioned in such notice as aforesaid, that the amount of the said debt and costs, and all subsequent costs, shall become payable by me. As witness my hand this 9th day of May, 1832.

“ Wm. Pyne.

“ Witness, Chas. Tinsley, clerk to Mr. Pyne,

“ 10, Duke-street, St. James's.”

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The *first* count of the declaration stated that an action had been brought by the plaintiff against Thomas Manning for the recovery of a debt, and that an agreement was entered into between the plaintiff and the defendant; and it recited the agreement verbatim, except in substituting the past for the present tense throughout; and averred that the plaintiff had accepted a cognovit from T. M.; and that notice was given on the 16th of June to the defendant, that T. M. should attend at the office of Messrs. Dover & Lawrence at two o'clock on the 23rd of June, and that T. M. did not attend; and it was further averred, that another such notice was given on the 17th of July for T. M. to attend on the 24th of July, but that he did not then attend; and it was also averred that the original debt was still due to the plaintiff. The *second* and *third* counts were similar; but stated the agreement very shortly, and omitted all that part of the first count which related to the notice given on the 16th of June, and to the non-attendance of Mr. Manning on the 23rd of June.

The agreement was put in, and also the cognovit given by Mr. Manning, which was as follows:—"Between William Turner, plaintiff, and Thomas Manning, defendant.—I, the above-named defendant, do hereby withdraw the plea by me pleaded, and do confess this action, and that the plaintiff hath sustained damage to the amount of 100*l.*; but judgment is not to be entered up hereon unless default of payment of the sum of 37*l.*, being the debt and costs in this action to the signing hereof, in manner following, namely, the sum of 5*l.*, part thereof, on the 15th day of June, and the like sum of 5*l.* on the 15th day of each succeeding calendar month, until the whole of the said sum of 37*l.* is fully paid and satisfied; but, in case default is made in payment of any or either of the said instalments on the days on which the same are respectively payable, the said plaintiff shall immediately be at

liberty to enter up judgment for the whole of the said sum of 37*l*., or so much thereof as shall remain unpaid, and levy for the same, together with the costs of entering up judgment, and of the execution to be issued thereupon, sheriff's poundage, officers' fees, expenses of sale, and all incidental expenses. And I undertake not to bring a writ of error, file any bill in equity, or do any other act to delay the plaintiff in enforcing his execution. Dated the 9th day of May, 1832.

(Signed) "Thos. Manning.

"Witness, Chas. Tinsley, clerk to Mr. Pyne,

"10, Duke-street, St. James's."

It was proved by the cross-examination of Mr. Tinsley, the subscribing witness to the agreement, that notice was given to Mr. Pyne on the 16th of June to cause Mr. Manning to attend at the office of Messrs. Dover & Lawrence on the 23rd of June at two o'clock; and it was also proved that a second notice was given to Mr. Pyne on the 17th of July, for Mr. Manning to attend on the 24th at two o'clock; and it was proved that Mr. Manning did not attend on the 24th of July.

On the part of the defendant it appeared, that, on his receiving the notice on the 16th of June, he desired Mr. Manning to attend at Messrs. Dover & Lawrence's office at two o'clock on the 23rd; and it was proved by Mr. Manning, and also by another witness who was with him, that, at about half-past one o'clock on the 23rd of June, they saw Mr. Lawrence at the office of Messrs. Dover & Lawrence, and that he said he would give Mr. Manning another week's time, and that Mr. Manning need not attend at two o'clock, as he (Mr. L.) wanted the money, and did not want to take Mr. Manning. It further appeared, that, on the 18th of June, judgment had been signed against Mr. Manning on the *cognovit* for 37*l*., which was the whole amount due, and that a writ of *capias ad satisfaciendum* had been sued out on the 22nd of June.

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DENMAN, C. J.—If Mr. Manning went to the office of Messrs. Dover & Lawrence according to the notice, that is all that the defendant agreed that he should do.

Knowles, for the plaintiff.—The words of the agreement are in pursuance of *any* notice, therefore he ought to have attended again on the 24th of July.

Moody, for the defendant.—When a default had been made, and judgment was entered up for the whole, a *ca. sa.* would then issue for the whole, and the party could only be taken once upon it. After judgment signed for the whole, there was an end of the arrangement about instalments.

DENMAN, C. J.—I think, that, by the attendance of Manning on the 23rd of June, the guarantie was strictly complied with, and that he was not bound to go again on the 24th of July. There must be a verdict for the defendant. However, I will give Mr. *Knowles* leave to move to enter a verdict if the Court should be with him on the construction of the agreement.

Verdict for the defendant.

Knowles, for the plaintiff.

Moody and *Carrington*, for the defendant.

[Attornies—*Dover & Lawrence*, and *Pyne*.]

IN the ensuing term Sir *J. Scarlett* moved in pursuance of the leave given by the Lord Chief Justice; but the Court refused a rule.

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REX v. MAYHEW.

Feb. 26th.

PERJURY.—The perjury was alleged to have been committed by the defendant (who was an attorney), in an affidavit made by him to oppose a motion made in the Court of Chancery, on behalf of the prosecutor, Mr. Miles, to refer the defendant's bills of costs for taxation.

To prove the perjury one witness was called, and, in lieu of a second witness, it was proposed to put in the defendant's bills of costs delivered by him to the prosecutor.

It was suggested that this was not sufficient, as the bills had not been delivered by the defendant on oath.

To prove perjury, it is sufficient if the matter alleged to be falsely sworn be disproved by one witness, if, in an addition to the evidence of that witness, there be proof of an account or a letter written by the defendant contradicting his statement on oath.

DENMAN, C. J.—I have quite made up my mind that the bill delivered by the defendant is sufficient evidence; or that even a letter, written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness.

The defendant was acquitted on the facts of the case.

Halcomb, F. V. Lee, and G. T. White, for the prosecution.

Sir J. Scarlett and F. Pollock, for the defendant.

[Attornies—*Williams, and Mayhew & J.*]

(a) Sir W. Russell lays down (2 Cr. & Misd. 544-5), that "the evidence of one witness is not sufficient to convict the defendant on an indictment for perjury, as, in such case, there would be only one oath against another;" and for this he cites several authorities, and then adds—"But this rule must not be understood as establishing that two witnesses are necessary to disprove the fact sworn to by the defendant; for, if any

material circumstance be proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale, and warrant a conviction;" and for this he cites *Rex v. Lee*, Mich. 6 Geo. 3, from a MS. of Mr. Justice Bayley. However, if the date be correct, it is evident that the note could not have been taken by the learned Judge himself, as the case was decided nearly sixty-nine years ago.

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COURT OF EXCHEQUER.

Second Sittings in London, in Hilary Term, 1834.

BEFORE MR. BARON BOLLAND.

Jan. 29th.

SOLLY and Another, Executors of CHANDLESS, v. HIND
and Another, Executors of UNDERDOWN.

A., having appointed B. his executor, gave him a promissory note, payable on demand for 100l., in consideration of the trouble he would have in the office of executor after his death. B. died in A.'s lifetime, not having put the note in suit:—*Held*, in an action upon it by B.'s executors, that the consideration had totally failed, and the action, therefore, was not maintainable.

ASSUMPSIT on a promissory note in the following form:—

“ Ramsgate, 15th August, 1832.

“ On demand, I promise to pay Mr. John Chandler, or order, the sum of one hundred pounds, value received.”

“ Robert Underdown.

“ Henry Justice.”

A witness, named Bolton, was called to prove the handwriting of Underdown to the note.

Humfrey, for the defendants, submitted, that, from the form of the note, it would appear on inspection that there was a subscribing witness to the signature, viz. “Henry Justice,” and, therefore, the evidence of handwriting by another witness was not admissible.

BOLLAND, B.—The note itself does not tell me that the name, Henry Justice, is that of a subscribing witness.

Humfrey.—As the note is, in form, the note of a single person, the second name must be taken *primâ facie* to be that of a subscribing witness.

Follett, for the plaintiffs.—An action might be brought against either of the parties who have signed the note. The name of Henry Justice is not in the place for a subscribing witness. *March v. Ward* (a), and *Clark v. Black-*

(a) *Peake*, 130, per Lord Kenyon, C. J.

stock (b), shew that a note signed in this manner is a joint and several note.

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BOLLAND, B.—I agree that it is uncertain which of the two is the person making the note. I will receive the evidence of handwriting, and Mr. *Humfrey* shall have leave to apply to the Court.

The handwriting of Underdown was then proved, and the note was read.

Humfrey then called Henry Justice, and proposed to ask him whether he was the subscribing witness to the note; and submitted, that, if he answered in the affirmative, the plaintiffs must examine him as their witness.

Follett said, he should object to *Humfrey's* addressing the jury after he had put any question to the witnesses. It is similar to the case of written evidence. If it had appeared, in the course of the plaintiff's case, that there was a subscribing witness, then the plaintiffs must have called him. But as it did not, the defendant must call him and examine him in the regular way. *Primâ facie*, Justice comes to discharge himself, and I shall claim the right to cross-examine him.

BOLLAND, B., was of opinion, that the plaintiffs' counsel had a right to cross-examine the witness, and that he must be called in the regular way, after the opening of the defendants' case.

Humfrey then addressed the jury, and stated that he should shew, by the evidence of Justice, that the consideration for the note had totally failed, as it was given expressly for the trouble which Chandler would have as Underdown's executor after his death, which trouble

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Chandler never in fact had, inasmuch as he died before Underdown.

Henry Justice was then called as a witness.—He stated, that he was present at the time when the note was signed, and put his name to it as a subscribing witness. He swore that it was distinctly stated at the time, that the note was given to Chandler in consideration of the trouble which he would have as Underdown's executor after his death, and he denied expressly that any thing was said about its being partly for trouble previously taken. The note was signed at Chandler's request, who brought it with him ready prepared for signature. Underdown said that he would much rather it had been entered in his will. Chandler said, if he would sign the note, it would save the legacy duty. At the time the note was signed, Underdown was in a bad state of health, but improving. About six weeks after, when he was quite recovered, Justice went to Chandler, and, by the desire of Underdown, asked him to give up the note. He said he would not, unless he got the 100%. It was admitted, that Chandler died about November, 1832, and that Underdown lived till September, 1833.

Follett, in reply.—Chandler might have sued the next day, as the note was payable on demand. The facts proved are not any answer to the plaintiffs' case, even assuming them to be altogether correct. The agreement to become executor is a good consideration for a note payable on demand. But I submit, that the note was given for services which had been rendered previously. This appears from the refusal of Chandler to give up the note, and Underdown not persisting in requiring it after the refusal. The note itself imports consideration, and it is not sufficiently rebutted by the evidence. The defence is, that Chandler attempted to swindle Underdown out of the 100%. If that had been so, he would not have continued

him his executor, as the witness, Justice, says he believes he did.

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BOLLAND, B., (in summing up), said—The question which you will have to decide will be, whether or not you believe the witness Justice. According to the account he gives, the sole consideration for the making of the note was, the trouble Chandler would have as executor after the death of Underdown. Now, it appears by the admissions, that Chandler died before Underdown; therefore, the consideration never could be fulfilled, as Chandler, dying before Underdown, could not of course perform the office of executor to him. As the consideration has failed altogether, I, in point of law, tell you, that, if you believe the witness, your verdict ought to be for the defendants.

Verdict for the defendants.

Follett.—Will your Lordship give me leave to move to enter a verdict for the plaintiffs, if the Court should think that the defence set up is no answer in point of law. Your Lordship sees that the evidence is rather of an agreement, that the note was not to be sued on till after the death of the maker, as the office of executor could not arise till then.

BOLLAND, B.—I may be wrong; but I have no doubt at all that the consideration has totally failed, and that the defence is, in point of law, an answer.

Follett then suggested, that perhaps if the other Judges should differ in opinion from his Lordship, then, to save the expense of another trial, he would give leave to enter a verdict for the plaintiffs.

BOLLAND, B.—Assented.

Follett and *Lumley*, for the plaintiffs.

Humfrey, for the defendants.

[Attornies—*Johnson & Wetherell*, and *Redaway*.]

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In the course of the term, *Follett* moved, pursuant to the leave given; but the Court were of opinion, that the decision at Nisi Prius was correct, and therefore refused a rule.

Jan. 29th.

DIXON v. NUTTALL.

"I promise to pay to M. A. D., or bearer, on demand, 16*l*. at sight, by given up clothes and papers, &c.," was sued on as a promissory note:—*Held*, that if the jury thought that the clothes, &c. had been previously given up by the payee to the maker, it was a good promissory note, as the words in that case would only import the value received.

ASSUMPSIT on the following promissory note:—

"I promise to pay to Mary Ann Dixon, or bearer, on demand, the sum of sixteen pounds, at sight, by given up clothes and papers, &c.

"Nuttall Nuttall."

It appeared that the plaintiff had cohabited with a brother of the defendant up to the time of his death; and there being some difficulty in ascertaining what property he left, and which of the things in the house in which they lived belonged to the deceased, and which to the plaintiff and her mother, the defendant, who had taken out letters of administration, had an interview with the plaintiff, when she stated that several things had been given to her by the deceased; and it was finally arranged that she should give up to the defendant the deceased's clothes and papers, and a book which contained entries respecting some money in the Bank; and that the defendant should pay her the sum of 16*l*.; for which sum the note in question was given. There was contradictory evidence as to whether the plaintiff had kept back any of the things, and also as to whether the note was signed before or after the things were given up to the defendant.

Bompas, Serjt., for the defendant, first submitted that the instrument was not in form a promissory note.

BOLLAND, B.—Coupled with the evidence, I think it is

a promissory note. As explained the words at the end shew the value given.

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Bompas, Serjt., then contended, that, as it was payable “*at sight*,” it was necessary to prove presentment; and also, that the maker was entitled to three days’ grace.

BOLLAND, B.—“On demand, at sight,” means, if you demand it, and shew it, you may recover. If it had been at sight merely, you would have been right.

Bompas, Serjt.—The second count is not good, for it omits the latter part of the note.

BOLLAND, B.—That part, as I take it, is merely “value received” (a).

Bompas, Serjt.—If it is a condition, then it is not a promissory note (b).

BOLLAND, B., (in summing up)—In my opinion the instrument in question is a promissory note, and there is nothing at all equivocal in it. On the part of the defendant it is said, that the latter part is conditional. It seems to me that it amounts only to “value received.” It is for you to say whether or no all has been done according to the

(a) It is not essential that a bill or note should import to be for value received. *White v. Ledwick*, Bayl. on Bills, 34.

(b) An order or promise to pay money, “*provided* the terms mentioned in certain letters written by the drawer were complied with,” is not a bill or note. *Kingston v. Long*, Bayl. on Bills, 13. “A note, promising to pay *J. F.*, or order, a sum certain, the amount

of the purchase-money of a quantity of fir belonging to *H.*, with an indorsement thereon, at the time of making the note, that it was given *on condition* that it should be void if any dispute should arise between *H.* and *W.* respecting the fir, was held not to be a promissory note within the stat. 3 & 4 Ann. c. 9.” *Hartley v. Wilkinson*, 4 M. & S. 25, and 1 Camp. 127.

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evidence on the part of the holder of the note to entitle her to recover upon it. One witness says, that the note was given the night before, and the things were to be delivered up the next morning. But another witness says, that the note was not delivered till the morning, and was given after the things had been delivered up. If you think the note was given after the things were given up, then you will find your verdict for the plaintiff. If you think it was given first, and that it was left to the honesty of the plaintiff to give up all, and all were not given up, then you will find your verdict for the defendant, provided you think, from looking at the note, that it is open to the construction contended for.

Verdict for the plaintiff—Damages 16*l.*, on the first count.

Milner, for the plaintiff.

Bompas, Serjt., for the defendant.

[Attornies—*Blakclock & T.*, and *Clarke & M.*]

IN the course of the term, *Bompas*, Serjt., moved to set aside the verdict on the two grounds taken by him at Nisi Prius. The Court were against him on the point as to the instrument's being conditional, and therefore not a note. But they granted him a rule nisi on the point as to the effect of the words—"on demand, at sight." This rule came on to be argued in Trinity Term, and was made absolute for a nonsuit.

OLD BAILEY SESSIONS.

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FEBRUARY SESSION. 1834.

BEFORE MR. JUSTICE PARK, MR. JUSTICE PATTESON, MR.
BARON GURNEY, AND MR. RECORDER LAW.

REX v. JAMES PAUL.

Feb. 20th.

THE prisoner had been committed to prison on the 4th of January, 1834, for embezzling certain monies, the property of Ebenezer Maitland and others, his employers.

The Court at the Old Bailey, three of the Judges being present, refused to discharge, without the preferment of any bill, the recognizances of prosecutors being members of a society for promoting religious knowledge among the poor, who had caused a servant to be committed for embezzlement, the application not being made on the ground of any defect in the evidence, but on the ground that they, the prosecutors, thought that the reformation of the offender would be best promoted by such a course. But where parish officers were under recognizances to prosecute a pauper for obtaining money un-

Payne, as counsel for the prosecution, applied to the Court to allow the recognizances of the prosecutors to be withdrawn, without any bill being preferred before the grand jury. He stated as ground for his application, that the prosecutors, who were the committee of a society called "The Book Society for promoting Religious Knowledge among the Poor," had, after much deliberation, come to a conclusion, that, considering the imprisonment which the prisoner had undergone, and his conduct under it, and the effect it had produced upon him, the reformation of the offender, which was one great object of punishment, was most likely to be effected by foregoing, if the Court would permit, all further prosecution. He added, that, if the Court desired, he was prepared to state the peculiar circumstances under which the committee had come to that conclusion.

PARK, J.—We ought not to hear the circumstances, as, if we did, it might prejudice the case of the prisoner. I think, that we have no power, or rather that we ought not, to grant the application.

der false pretences, a Judge at the Assizes, on motion, permitted the recognizances to be withdrawn, the party having been in prison for several weeks, and the parish being unwilling to indict.

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Payne suggested, that, as the prosecutors were members of a public society, and had no personal interest in the matter, it would do no harm to the public if the application were granted.

PARK, J.—No person ought to have any interest in a prosecution; it should be carried on for the public benefit.

PATTESON, J., inquired if there was any difficulty in making out a case.

He was answered in the negative. Upon which the learned Judges consulted together, and Mr. Justice *Park* said, they were of opinion, that, upon public grounds, the application ought not to be granted (a).

The prisoner was afterwards indicted, and pleaded guilty to two acts of embezzlement; upon which he was strongly recommended to mercy by the prosecutors, and was sentenced to an imprisonment of fourteen days, making altogether an imprisonment of about two months.

Clarkson, and *Payne*, for the prosecution.

Adolphus, and *C. Phillips*, for the prisoner.

[Attornies—*Hollingsworth*, and *Humphreys*.]

(a) The case of *Rex v. Adams* was cited by *Payne* in the course of the above application; but their Lordships did not make any observations upon it. It was the case of a man who was committed about the middle of *January* to the gaol at *Aylesbury*, for obtaining 6s. from the overseers of a parish in *Bucks*, by falsely pretending that

he was out of work and in want of relief. *Malby*, for the parish officers, applied at the assizes, on the first day of *March*, for permission to withdraw the recognizance which had been entered into to prosecute, as the parish did not wish to prefer any bill. The Judge (Mr. Baron *Vaughan*) granted the application.

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BEFORE MR. JUSTICE PARK, MR. JUSTICE PATTESON, AND
MR. BARON GURNEY.

—
REX v. FOSTER.

Feb. 21st.

MANSLAUGHTER.—The prisoner was charged with manslaughter, in killing John Ferrall, by driving a cabriolet over him.

On the part of the prosecution, a waggoner was called. He stated, that he was driving his waggon, and that he saw the cabriolet drive by at a very rapid rate, but did not see the accident; and he further stated, that immediately after, on hearing the deceased groan, he went up to him and asked him what was the matter.

C. Phillips, for the prisoner.—I submit, that what the deceased said in the absence of the prisoner, as to what had caused the accident, is not receivable in evidence.

GURNEY, B.—What the deceased said at the instant, as to the cause of the accident, is clearly admissible.

PARK, J.—I am of opinion, that his evidence ought to be received. It is the best possible testimony that, under the circumstances, can be adduced to shew what it was that had knocked the deceased down. The case of *Aveson v. Lord Kinnaird* (a), in which I was counsel many years ago, bears strongly on this point.

PATTESON, J., concurred.

The evidence was received.

Verdict—Guilty.

C. Phillips, for the prisoner.

(a) 6 East, 193. In that case, Lord *Ellenborough* said, that, if a wife left her husband's house, de-

claring at the time that she did so from immediate terror of personal violence, he should admit that de-

A. was charged with manslaughter in killing B., by driving a cabriolet over him. C. saw the cabriolet drive by, but did not see the accident, and immediately afterwards, on hearing B. groan, C. went up to him, when B. made a statement as to how the accident had happened:—*Held*, that this statement was receivable in evidence on the trial of A. for the manslaughter of B.

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claration as evidence; but not if it were a collateral declaration of some matter which happened at another time; and his Lordship referred to the case of *Thompson et Us. v. Trevannion*, Skin.402, where, in an action by husband and wife, for wounding the wife,

Lord Chief Justice *Holt* allowed what the wife said immediately upon the hurt received, and before she had time to devise any thing for her own advantage, to be given in evidence as part of the *res gesta*.

Feb. 22nd.

REX v. BRANNAN.

On an indictment for uttering a forged check in the name of J. W., on Messrs. C., G., & Co., who were army agents and bankers, it was proved by a clerk in the former department, that he did not know of any customer named J. W., and that he had been told by the other clerks that there was not any such customer in the banking department:—

Held, that this was sufficient proof, on the part of the prosecution, to call upon the prisoner to shew that there was in fact such a person as J. W. having an account with Messrs. C., G. & Co.; and in the absence of such proof, was sufficient by itself for the consideration of the jury.

THE prisoner was indicted for forging, and also for uttering, knowing it to be forged, an order for the payment of money (viz. a check for 10*l.*) with intent to defraud the prosecutor

It appeared that the prisoner went to the prosecutor, who was a watchmaker, and had a gold watch on trial, the price of which was ten guineas, and left as security a check for 10*l.* drawn in the name of John Weston on Messrs. Cox, Greenwood, & Co.

A clerk from Cox, Greenwood, & Co's. establishment was called, and swore that there was not any person of the name of John Weston having any account there; and that the check in question was presented to him, and payment was refused on that ground. On his cross-examination he said, that Messrs. Cox, Greenwood, & Co. were bankers and army agents, and that he was not a clerk in the banking, but in the army agent department. He added, that he could not swear that he knew the names of all the customers of the house; but he did not know of any one of the name of John Weston in his department, and that he had inquired of the other clerks, and was informed by them that there was no such person in the banking department.

Payne, for the prisoner, submitted, that this was not suf-

ficient evidence of there not being such a person as John Weston keeping cash at Messrs. Cox, Greenwood, & Co's. He referred to the case of *Rex v. King* (a), where a prisoner was acquitted on the ground that sufficient inquiry had not been made after a person who was described as living at the Market Place, Birmingham. In that case, the witness called was not personally acquainted with the place.

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PARK, J., intimated that he thought it was *primâ facie* evidence, and, if not contradicted, was sufficient for the jury's consideration.

Payne submitted, that *primâ facie* evidence meant evidence to the full extent, though not *the strongest* evidence which could be produced; and that the evidence in the present case, being partly hearsay, was only partial, and not going to the full extent, and, therefore, did not amount to a *primâ facie* case.

PARK, J., said, that he still thought it was *primâ facie* evidence; and that there was enough to call upon the prisoner to shew, that, in fact, there was a John Weston having an account at Messrs. Cox, Greenwood, & Co's. It would be highly inconvenient to trade, if it were held to be necessary to call all the clerks in a house of business to prove such a negative.

PATTESON, J., was also of opinion that it was *primâ facie* evidence.

GURNEY, B., said, that he thought the case cited did not apply; as, to prove that a man did not live at the

(a) *Ante*, Vol. 5, p. 123. The evidence in that case went to the jury; but the learned Judge told them that it was not the most sa-

tisfactory; and left it to them to say whether they thought the inquiries made were sufficient.

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Market Place, Birmingham, it was necessary to call a person who was very well acquainted with that place.

There was no evidence on the part of the prisoner, and he was convicted.

Payne for the prisoner.

[Attornies ———, and *Tomlins*.]

Feb. 22nd.

REX v. JOHN WATERS.

A., being on board a ship, and B. in a boat alongside, had a dispute about payment for some goods, both being intoxicated. A., to get rid of B., pushed away the boat with his foot; B., reaching out to lay hold of a barge, to prevent his boat from drifting away, over-balanced himself, and fell into the water, and was drowned. A. was charged with manslaughter, on the coroner's inquisition:—*Held*, on the trial, that the facts did not constitute that offence.

THE prisoner was charged with the manslaughter of John Slee, on the coroner's inquisition, the grand jury having ignored the bill.

It appeared, that the prisoner was a seaman on board a schooner lying in the river Thames, and the deceased was a person in the habit of going about in a boat among the ships in the Pool selling spirits, purl, hot beer, &c., and that, on the day in question, the prisoner and he had some dispute about paying for some spirits, and, both being intoxicated, a good deal of rough joking had taken place between them. The first witness for the prosecution swore, that the deceased's boat being along-side the schooner, the prisoner pushed it with his foot, and the deceased stretched out over the bow of the boat, to lay hold of a barge, to prevent the boat from drifting away, and, losing his balance, fell overboard, and was drowned.

Payne, for the prisoner submitted, that this was not a case of manslaughter.

PARK, J., inquired of the coroner, who was on the bench, whether there was any other witness who could carry the case further, and being informed by him of the name of one, called him into the box, and examined him; but he

swore that it was another man, and not the prisoner who pushed away the boat.

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PARK, J., after consulting with Mr. Justice *Patteson*, said, that his learned brother and himself were of opinion, that, if the case had rested on the evidence of the first witness, it would not have amounted to a case of manslaughter; but that, as it now stood, of course the prisoner was entitled to an acquittal.

Verdict—Not guilty.

Payne, for the prisoner.

BEFORE MR. BARON GURNEY.

REX v. BATT and Others.

Feb. 24th.

INDICTMENT for riotously assembling and beginning to demolish the house of one Liddiard.

From the evidence on the part of the prosecution, it appeared that the prosecutor kept a public-house called the Silver Lion, and that a person named Miller, a coal-lumper, had his pay-table there; that, about half-past eight in the evening of the 3rd of February, Miller was in the back kitchen of the house, with some money in a bason, for the purpose of paying the coal-whippers who were under his control; that the shout of a mob was heard, and a cry of "Murder Miller and all the bloody lumpers!" Many large stones and brick-bats, and a flat-iron, were thrown at the

Every man has a right to work for the best price he can get; but, if others choose to work for less than the usual prices, the law will not permit that violence should be committed towards them, or towards those by whom they are employed, or those with whom they are connected.

Where a party of coal-whippers, having a feeling of ill-will to a coal-lumper who paid less than the usual wages, created a mob, and riotously went to the house where he kept his pay-table, and cried out that they would murder him, and began to throw stones, brick-bats, &c., and broke windows and partitions, and part of a wall, and continued, after his escape, throwing stones at the house, till they were compelled to desist by the threats of the police:—*Held*, that they might be convicted of beginning to demolish, under the stat. 7 & 8 Geo. 4, c. 30, s. 8, though their principal object was to injure the lumper, provided it was also their object to demolish the house, either on account of its being used by him or his men, and though they had not any ill-will against the owner of the house personally.

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house, and the mob rushed in. Miller got over the wall of a back yard and made his escape. It appeared, that the men in the employ of Miller were in the habit of working for less wages than many others in the trade thought right. The prosecutor said he had no quarrel with the men, but that they had with Miller, and he had no doubt that they wished to wreak their vengeance on Miller, and, if he had not made his escape, would have murdered him. He added, that it was notorious that the pay-table of Miller was at his house. A person who kept a public-house more than half a mile from the Silver Lion, proved that he saw the mob, on the evening in question, near his house; that they broke his lamp, and he heard them say as they went off—"Away for Miller's, and pull the ——'s house down!" Miller did not live at the Silver Lion, but at some distance from it. The names of the prisoners were, Batt, Donoghue, and Kipping. With respect to Kipping, it appeared, that, just before the mob came up, he went to the Silver Lion, and asked for some beer, and said, "Where is bloody Miller?" And that when the mob came in, he pursued one of Miller's men into the back yard, and tried to seize him while he was escaping over a wall. Batt was proved to have been with the mob, and to have thrown stones several times at the house. Donoghue was with the mob both before and after the attack upon the house, and pointed out to the mob one of Miller's men; and when he was taken two days after, being told it was for the disturbance at Stepney, said, "Is that all; I wish we had broke the ——'s bloody neck." While the mob were engaged in throwing stones at the house, a policeman ran in between them and the front of the house, and, drawing his staff, told them to desist, adding, that the first man he saw throwing any stone, he would take him into custody or knock him down. They then went away, and were met some distance off in a riotous and disorderly state, and rescued Kipping from a

policeman, who had just taken him into custody. A surveyor proved, that, in addition to the breaking of the windows in the front of the house, a sash in a door inside was broken to pieces, and one pannel in a door, and another in a partition, were broken quite out. The partition itself was much injured, and a wall in the back yard was also broken down.

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C. Phillips, for the prisoners, submitted that the case did not come under the statute. The jury must be satisfied that the intent was finally to demolish the house; and it was plainly proved, that, in the present case, the object was to do some injury to Miller, as there was a search made for him in the back yard. He also read Mr. Justice *Littledale's* opinion in the case of *Rex v. Thomas (a)*; and submitted that there was scarcely any difference between that case and the present.

GURNEY, B.—I think there is a very important distinction; I do not differ from Mr. Justice *Littledale's* opinion.

GURNEY, B., (afterwards in summing up) said—This indictment charges the prisoners with the offence, that they, together with several other persons, riotously assembled; and, being so riotously assembled, they riotously began to demolish the house of the prosecutor Liddiard. The prisoners were coal whippers; and there seems to have been some discontent and dissatisfaction on account of a difference in the wages taken by some of that body.

(a) Ante, Vol. 4, p. 238. Mr. Justice *Littledale* said, in that case, "I am of opinion that this will not be a beginning to demolish, within the act of Parliament, unless the jury shall be satisfied that the ultimate object of the rioters was to demolish the house; and that, if they had carried their intentions into full effect, they would, in point of fact, have demolished it. Now, here, that is not so; for they come and do a great deal of mischief, and then go away, having manifestly completed their purpose, and done all the injury they meant to do."

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Every man has a right to work for the best price he can get; but, if others choose to work for less than the usual prices, the law will not permit that violence should be committed towards them, or towards those by whom they are employed, or those with whom they are connected. The prosecutor says, he does not think that the mob had any animosity against her; but they had some ill-will against Miller; and if, in the execution of one purpose, they extend their purpose, and do two mischiefs instead of one, they must take the consequences. If this indictment had been differently framed, it might have been sustained. If the indictment had been for breaking and entering the dwelling-house in the night-time, with intent to commit a felony, then it might, I think, have been sustained against those of the mob who broke into the house. His Lordship read the evidence through, and then observed:—It does not follow that, because their object was to murder Miller, they had not a further object to demolish the house, which is to be judged of from what they did, and the interruption they met with. A surveyor has proved the damage done; and no doubt the damage is sufficient, provided you are of opinion that the demolition of the house was the object of the mob. The first question is, whether there was a riotous assembly? There can be no doubt of that. Then, if so, what was the object of the parties? The mob say, "Away for Miller's;" but they do not go there, but to the White Lion; and the account of the transaction there seems to begin thus: Kipping asked for beer, and used an expression of ill-will against Miller. But though he did so, yet there is no evidence that he was seen with the mob before this, but only afterwards. He was in the house before the mob came. And if his was a separate object of vengeance against Miller, he will not be guilty on this indictment. There is no evidence as to Donoghue of his having done any thing at the house. He was in the mob both before and after. Now, as to the offence itself:—A mob's going along and breaking a person's windows is not

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a beginning to demolish, even though the frames of the windows should be broken, because the object of the mob in such a case is evidently very different. But here, there is a purpose of violence against Miller, and a purpose of pulling down *his* house. The mob, however, do not go to Miller's, but to the White Lion, and when they get there, it seems that they began to throw stones and brick-bats. In the case cited of *Rex v. Thomas*, there was nothing to prevent their going on; and, in favour of life, it was inferred, that, as they left off voluntarily, they never had any intention of proceeding further. But, certainly, that is not so here; because, there is the interference of the police, and it was after the threats of the police that the mob desisted. If you are of opinion, that this mob began to do mischief to the house, intending to persist in demolishing it if they were not interrupted, either on account of Miller's having his pay-table there, or of the men working at lower prices using the house, the offence charged will have been committed; and it should be promulgated, that each and every one in the mob is guilty of the offence committed. Every one cannot do the same thing, but, if they are there for the one common purpose, they are answerable. If you are of opinion, that there was no beginning to demolish the house, then you will find the prisoners not guilty. The mob might have two purposes, and, if one of those two purposes was to demolish the house, there was a sufficient beginning to demolish to support the indictment. As to the three prisoners, you will say how many of them were with the mob for the common purpose.

Verdict of guilty against all the prisoners.

Adolphus, for the prosecution.

C. Phillips, for the prisoners.

[Attornies— ——— and *Humphreys*.]

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APRIL SESSION, 1834.

BEFORE MR. JUSTICE GASELEE, MR. BARON VAUGHAN, AND
MR. RECORDER LAW.

April 11th.

REX v. MARY SLATER.

Where a witness for the prosecution, in a case of felony at the Old Bailey, on being asked to repeat an answer which she had previously given, before the whole of it had been taken down, omitted what the prisoner's counsel thought an important part of it, and denied that she had ever uttered such part, the Judges allowed the short-hand writer of the Court, who had taken down the answer, to be examined as a witness, to shew whether the words had been used or not.

THE prisoner was indicted for cutting and wounding Johanna Moriarty, with intent to do her some grievous bodily harm.

A female witness, who was with the prosecutrix at the time of the injury, said, in her examination in chief, "The prisoner had been annoying Mrs. Moriarty all the day, *and me also.*"

C. Phillips, for the prisoner, repeated the latter part of the sentence, and requested Mr. Baron *Vaughan*, who was examining the witness, particularly to take it down.

VAUGHAN, B., desired the witness to repeat what she had said.

The witness repeated the first part of the sentence, but omitted the words "and me also." And, on being asked by *C. Phillips*, positively denied having ever used those words.

C. Phillips requested that the short-hand writer of the Court might be called, to state whether or not he had taken down those words.

The Court granted the permission requested. The short-hand writer was sworn, and stated that he had taken down the words attributed to the witness.

The prisoner was found guilty, but recommended to mercy, on the ground that the parties were Irish, and on account of the excitement of the day, it being St. Patrick's Day.

C. Phillips, for the prisoner.

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BEFORE MR. JUSTICE GASELEE, MR. BARON VAUGHAN, AND
MR. JUSTICE TAUNTON.

—◆—
REX v. RICHARDSON and four Others.

April 12th.

FOUR of the prisoners were indicted for sacrilegiously breaking and entering a chapel, called Saint Philip's chapel, in the parish of Clerkenwell, and stealing therein certain things. The other prisoner was charged as receiver.

A dissenting meeting-house is not within the statute 7 & 8 Geo. 4, c. 29, s. 10, which makes it a capital offence to "break and enter any church or chapel, and steal therein," &c.

A witness for the prosecution stated, that Saint Philip's chapel was in the parish of Saint James, Clerkenwell, and in the district of Saint Mark, which was a district marked out for ecclesiastical purposes.

Mr. Justice TAUNTON tried the case, Mr. Justice GASELEE and Mr. Baron VAUGHAN were present.

Mr. Justice GASELEE asked the witness if service was performed in the chapel according to the rites of the Church of England, saying, that a dissenting chapel had been considered as not within the act (a).

(a) On the previous day, in the case of *Rex v. Warren and Spencer*, the prisoners were indicted for breaking and entering a chapel, which, upon the evidence, turned out to be a dissenting chapel.—Mr. Justice Gaselee and Mr. Baron Vaughan, (Mr. Justice Taunton not being then present), were of opinion, that, as dissenting chapels were mentioned expressly in the statute which makes the burning of churches, &c. a capital offence, and were not mentioned at all in the present statute, which stands in the Statute Book as the chap-

ter next preceding it, the omission must have been intentional. The 7 & 8 Geo. 4, c. 29, s. 10, enacts, "that if any person shall break and enter *any church or chapel*, and steal therein any chattel, or, having stolen any chattel in *any church or chapel*, shall break out of the same, every such offender, being convicted thereof, shall suffer death as a felon." The 7 & 8 Geo. 4, c. 30, s. 2, enacts, "that if any person shall unlawfully and maliciously set fire to *any church or chapel*, or to any chapel for the religious worship of persons dis-

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The witness replied that it was, and that the chapel had been consecrated on the first day of the present year.

TAUNTON, J., (in summing up, with respect to the receiver,) said—Whether he made any bargain or not, is a matter of no consequence. If he received the property for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased it. It is a receiving within the meaning of the statute.

Verdict—Three of the prisoners guilty, and two of them not guilty.

Clarkson, for the prosecution.

C. Philips and *Payne*, for the receiver.

[Attornies— ——— and *Tomlins*.]

sending from the United Church of England and Ireland duly registered or recorded," &c., such person shall be guilty of felony and suffer death.

BEFORE MR. JUSTICE GASELEE AND MR. JUSTICE TAUNTON.

April 14th.

REX v. NOEL.

THE prisoner was indicted for forging an indorsement on a bill of exchange, and also for uttering. A witness named M'Beath was called and cross-examined. A subsequent witness was asked, on cross-examination, whether he was not bail for the former witness M'Beath. He said, yes; and that he believed it was on a charge of keeping a gaming-house.

In order to prevent any impression against the character of the party so accused, the Court, at the suggestion of counsel, allowed such party to be called up again, and asked whether the charge was in fact true or false.

Alley upon this requested the Court, as it might make an impression against the character of the witness M'Beath, that he might be allowed to ask M'Beath himself, whether the charge of keeping a gaming-house was, in fact, a true charge or not.

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The Judges, after consulting together, allowed the question to be put, and M'Beath replied that the charge was not a true charge.

Verdict—Not Guilty.

Alley and *Doane*, for the prosecution.

Adolphus and *Bodkin*, for the prisoner.

[Attornies—*W. Stovin*, and *Person*.]

BEFORE MR. JUSTICE GASELEE, MR. BARON VAUGHAN, AND
MR. JUSTICE TAUNTON.

REX v. BOWMAN.

April 14th.

AT the last session, to which this case had been postponed (as reported, ante, page 101), the record having been made up in pursuance of the mandamus, the prisoner put in a special plea of *autrefois* convict, written on paper, and incomplete in form.

The Court said, it must be on parchment, and must also be complete.

Bodkin, for the prisoner.—The prisoner may plead ore

A plea of *autrefois* convict stated that the prisoner was indicted, convicted, and sentenced at a session of the peace duly holden by adjournment on Friday the 5th of July. The record produced in support of the plea stated that the indictment

was found at a session commenced and holden on Monday the 1st of July, and that the Court was adjourned till Tuesday the 2nd. And that the Court having re-assembled on Thursday the 4th, was adjourned to Friday the 5th, when the prisoner was tried and convicted. It was held that the plea of *autrefois* convict was not proved by the record, inasmuch as, for want of an adjournment from the Tuesday to the Thursday, the proceedings on the Friday were *coram non iudice*, and therefore a nullity.

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tenus; and the Court will give time that the plea may be put into proper form. If the material parts appear, it is sufficient.

PARK, J.—Ore tenus means that the prisoner may state the plea, but he must do so in the proper form.

PATTESON, J.—The only difference is, that it may either be put upon parchment by the prisoner, or he may dictate it ore tenus, and it may be taken down by the Clerk of Arraignment, and put upon parchment by him.

The Court gave time for the plea to be engrossed on parchment.

There being several other prisoners brought up to the bar with Bowman—

PARK, J., said—I understand that these prisoners are all in the same situation, but are not in possession of a similar record. If they wish to rely upon the same kind of plea, perhaps it may as well be taken down for all of them by the officer of the Court.

On the part of Bowman, the plea properly engrossed on parchment, and signed by counsel, was subsequently put in. It stated, that, at a general sessions of the peace, *duly holden by adjournment*, at the Sessions House on Clerkenwell Green, in and for the county of Middlesex, *on Friday the 5th day of July*, in the 4th year &c., before &c., he the said James Bowman was duly arraigned upon a certain indictment, which before then had been duly presented, and found &c. It then set out that indictment and the plea, and the finding of the jury, and the sentence of transportation for seven years, and proceeded, in the usual form, to aver that the judgment was still in force, and that the prisoner and the offence were the same

as those mentioned in the second indictment. And concluded with a verification by the record, &c. (a).

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PARK, J., addressing the Clerk of the Arraigas, said—Mr. Clark, you are the person representing the king; will you demur or reply?

Mr. Clark said—That the record was not in Court; and he understood that the prisoners were brought up by order of the Secretary of State, and he wished for time to communicate either with him or the Attorney-General, as there was neither counsel nor attorney engaged for the prosecution.

PARK, J.—I think the Court are bound, as this is a novel proceeding, to give you time to make inquiry. It is no hardship upon the prisoners, as they are under a sentence, which they by their plea admit to be correct.

In the case of *Rex v. Thomas Wheatley, H. Parker* for the prisoner put in a similar plea; and all the cases were by order of the Court adjourned to this present session, at which the Clerk of Arraigas replied “nul tiel record.”

The record in Bowman’s case was then produced and read. It stated, that, at the general quarter session of the peace, of &c. *commenced and holden* at &c., in and for &c., *on Monday the 1st day of July*, in the 4th year &c., before &c., by the oath &c., it was presented &c., It set out the indictment, and then proceeded thus:—“Whereupon the sheriff of the said county of Middlesex

(a) We have given the form of a plea of *autrefois acquit* in the case of *Rex v. William Sheen*, ante, Vol. 2, p. 634, which case see, with the authorities there cited. We have not thought it

necessary to give the form of the plea of *autrefois convict*, as there will be no difficulty in framing one, *mutatis mutandis*, from the plea of *autrefois acquit*.

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is commanded that he cause the said James Bowman to come to answer the premises, and *thereupon the said Court is adjourned until Tuesday the 2nd day of the said month of July*, then to meet at the said Sessions House upon occasion of the premises aforesaid. And be it further remembered, that *the said Court having re-assembled* upon occasion of the premises aforesaid, at the said Sessions House, in the said county, *on Thursday the 4th day of the said month of July*, the said Court is adjourned until Friday the 5th day of the said July, then to meet at the Sessions House upon occasion of the premises aforesaid. And be it further remembered, that *the said Court having re-assembled* upon occasion of the premises aforesaid, at the said Sessions House, in the said county, *by adjournment as last aforesaid*, on the said Friday, the 5th day of the same month of July in the year aforesaid, cometh the said James Bowman, in his own proper person, and having heard the said indictment read, the said James Bowman saith he is not guilty," &c. It then stated the trial, verdict of guilty, and sentence and commitment of the prisoner to the gaol of Newgate.

Adolphus and *Wightman* appeared on behalf of the crown, but were not called upon to argue the case.

VAUGHAN, B.—Is it not quite clear that the re-assembling on the Thursday was coram non judice. Are we to infer that they assembled on the second day, when it is averred that they did not assemble till the fourth day?

Bodkin, for the prisoner.—The words are "*the said Court having re-assembled.*" We say, at a Sessions "*duly holden by adjournment.*" The crown should have demurred, and not replied "nul tiel record." If it is averred that the Court of Session duly met, this Court are not to infer that they did not properly adjourn.

TAUNTON, J.—A Court of Quarter Session must be ad-

journed; and it must be stated on the record that it was adjourned to a particular day. There is an adjournment to Tuesday, and no meeting again till the Thursday. There having been no adjournment to the Friday, the Court re-assembled on that day without any authority; and, having so assembled, whatever was then done was coram non judice, or non judicibus, and, being so done, was a nullity.

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Bodkin.—The question is, whether *the record shews* a sufficient irregularity.

TAUNTON, J.—There is an adjournment stated to the Tuesday, and that adjournment was not acted upon.

Bodkin.—In all the cases the fact of non-adjournment has been found. Here it is to be inferred only.

TAUNTON, J.—The record ought to state all the proceedings; and we cannot infer any thing not there stated.

Bodkin.—In the case of *Rex v. Lyme Regis* (a), which was a case of a return, *Buller, J.*, in giving his judgment, says (b):—"If the return be certain on the face of it, that is sufficient; and the Court cannot intend of acts inconsistent with it for the purpose of making it bad; and again, that presumption and intendment, as far as they go, must be in favour of returns not against them."

VAUGHAN, B.—That case does not go far enough for you.

GASELEE, J.—We cannot put in what they have not stated.

VAUGHAN, B.—In the case of *Rex v. Reader and Tur-*

(a) 1 Doug. 148.

(b) Page 159.

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OXFORD ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE PARK.

March 3rd.

REX v. AMIER.

HOUSE-BREAKING, and stealing two half-sovereigns, the property of William Smith (*a*).
A. broke into a house, and took two half-sovereigns from a bureau, which he, being disturbed, threw under the grate in the same room:—Held, that this was sufficient to constitute the felony of breaking into a house and stealing, within the stat. 7 & 8 Geo. 4, c. 29, s. 12.

(*a*) By the stat. 7 & 8 Geo. 4, c. 29, s. 12, it is enacted, "That if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security to any value whatever, or shall steal any such property to any value whatever, in any dwelling-house, any person therein being put in fear; or shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of five pounds or more; every such offender, being convicted thereof, shall suffer death as a felon." By the stat. 2 & 3 Will. 4, c. 62, it is enacted, "that any person guilty of stealing in a dwelling-house to the value of five pounds, or guilty of horse-stealing, cattle-stealing, and sheep-stealing, shall be transported for life" (leaving the Judge no discretion); and, by stat. 3 & 4 Will. 4, c. 44, the capital punishment of breaking and entering any dwelling-house, and stealing any chattel, money, or valuable

security to any value, and of being accessory before the fact thereto, is repealed: and by sect. 2 of that stat. it is enacted, "that every person who shall be convicted [of that offence, or of being accessory before the fact], shall be liable to be transported beyond the seas for life, or for any term not less than seven years, as the Court before whom any such person shall be convicted shall adjudge; and previously to transportation shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, or to be confined in the Penitentiary for any term not exceeding four years, or shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction for any term not exceeding four years, nor less than one year." And, by sect. 3 of the same stat. it is enacted, "That all persons punishable by transportation for life under the stat. 2 & 3

It appeared that the prisoner, after having broken into the house, took the two half-sovereigns from a bureau in one of the rooms, but that, being detected, he threw them under the grate in that room.

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v.
AMIER.

PARK, J.—If the half-sovereigns were taken with a felonious intent, this is a sufficient removal of them to constitute the offence (*b*).

Verdict—Guilty.

E. White, for the prosecution.

[Attorney—*Walsh*.]

Will. 4, c. 62, and under the stat. 2 & 3 Will. 4, c. 123, (which repeals capital punishment in certain cases of forgery), “shall be liable, previously to their being transported, in case the Court, before whom such person shall be convicted, shall think fit, to be imprisoned, with or without hard labour, in the common gaol or house of correction, or to be confined in the Penitentiary for any term not exceeding four years, nor less than one year.” We believe that it is the opinion of the Judges, that, under the words “shall be liable,” it is imperative on the Court to order an imprisonment before transportation.

(*b*) In the case of *Rex v. Walsh*, R. & M. C. C. 14, the prisoner had lifted a bag from the bottom

of the boot of a coach, but was detected before he had got it out. It did not appear that it was entirely removed from the space it had first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specific part had occupied. This was held by the twelve Judges to be such an asportation as was sufficient to constitute larceny. In the case of *Rex v. Thompson*, Id. 78, it was held, that, to constitute a stealing from the person, the thing must be completely removed from the person; and that a removal from the place where it was, which would be sufficient to constitute a simple larceny, is not sufficient if it remain throughout with the person.

1834.

March 4th.

REX v. POPE.

If a person picks up a thing when he knows that he can immediately find the owner, and, instead of restoring it to the owner, converts it to his own use, this is a larceny.

LARCENY.—The prisoner was indicted for stealing a hat, the property of John Harbage.

It appeared that the prosecutor and others had been quarelling in the passage of the Rising Sun public house, at Banbury; and that the prosecutor having his hat knocked off by some one, the prisoner, who had his own hat on his head, picked up the prosecutor's hat, and carried it home. It further appeared, that, on his taking it home, his wife said that there should be no stolen property there; and she threw the hat over a wall.

PARK, J., (in summing up).—If a person picks up a thing when he knows that he can immediately find the owner, and instead of restoring it to the owner, he converts it to his own use, this is a felony.

Verdict—Guilty.

Cooper, for the prosecution.

Churchill, for the prisoner.

See the cases on this subject, collected in 2 Russ. Cr. & Misd. 101 et seq.

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March 4th.

REX v. NELMES and Others.

WOUNDING.—The *first* count of the indictment charged the prisoner, James Nelmes, with having wounded Michael Parker, with intent to murder him; and this count then went on to charge that all the other prisoners were present, and feloniously aiding and abetting Nelmes in the commission of the felony. The *second, third, fourth, and fifth* counts stated the intent to be to maim, disfigure, disable, and do grievous bodily harm. The *sixth* count stated the intent to be to prevent the lawful apprehension of the prisoner Nelmes, for an offence for which he was then and there liable to be apprehended by the said Michael Parker, that is to say, for that all the prisoners were in certain inclosed land of the Right Hon. Montague, Earl of Abingdon, (stating the offence of night poaching by armed persons, exactly as it would be stated in an indictment for that offence). All the counts charged the other prisoners with aiding and abetting Nelmes; but the *seventh* count charged the whole of the prisoners as principals in the wounding of Parker, with intent to do him some grievous bodily harm. Each of the first six counts concluded against the form of the statute, but neither of them had a *contra formam statuti* at the end of the statement of the charge against the principal.

A count, which charges B. with shooting at A., with intent to murder him, and then charges C. and D. with aiding and abetting B., and at the end of the count concludes with a *contra formam statuti*, is good; and it need not state that B. shot A. with intent, &c., *contra formam statuti*, and that C. and D. aided him, also *contra formam statuti*.

Busby, for the prisoners.—I submit that the first six counts are not good. It ought to have been stated that the prisoner Nelmes wounded the prosecutor “against the form of the statute;” for, as it stands, it is averred that the other prisoners abetted him, against the form of the statute; but the *contra formam statuti*, being at the end of the count, must be taken rather to apply to the aiders and abettors than to the principal. It ought to have been stated in each count that the prisoner, James Nelmes, wounded the prosecutor, against the form of the

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statute; and then it should have been charged that the other prisoners aided and abetted him, also against the form of the statute.

PARK, J.—I think that the indictment is quite sufficient; indeed I have no doubt about it.

The jury found all the prisoners guilty, except Thomas Stephens.

Justice and Talbot, for the prosecution.

Busby, for the prisoner.

[Attornies—*Walsh and Tones*.]

March 4th.

REX v. ARIS.

Setting fire to a score of fag-gots, which were piled one upon another in a loft, which was made by means of a temporary floor put over an archway, roofed in between two houses, and under which carts could go, is not setting fire to a stack of wood within the stat. 7 & 8 Geo. 4, c. 30, s. 17.

BURNING.—The first count of the indictment charged the prisoner with having set fire to an out-house, the property of Richard Bartlett. The second count charged him with having set fire to a stack of straw; and the third count with having set fire to a stack of wood (a).

(a) By the stat. 7 & 8 Geo. 4, c. 30, s. 17, it is enacted, “that if any person shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, straw, hay, or wood, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon; and if any person shall unlawfully and maliciously set fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorze, furze, or

fern, wheresoever the same may be growing, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment.”

It appeared, that, between the house of the prosecutor and the house next to it there was an archway, which carts could go under, and that over this archway a sort of loft was made by means of a temporary floor; and that in this place the prosecutor kept wood, straw, and fuel. It further appeared, that, at the time of the fire, there was in this place about an armfull of straw, and a score of faggots, which were piled up one upon another. The straw was burnt, and also some of the faggots, but no part of the building caught fire.

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PARK, J.—I am clearly of opinion that this is not a stack of wood within the meaning of this act of Parliament. The prisoner must be acquitted.

Verdict—Not guilty.

Justice and Maclean, for the prosecution.

Walesby, for the prisoner.

[Attornies—*Field and Looker*.]

REX v. ELIZA BRAIN.

March 5th.

MURDER.—The prisoner was indicted for the murder of her male bastard child.

It appeared that the prisoner had been delivered of a child at Sandford Ferry; and that the body of the child was afterwards found in the water, about fifteen feet from the lock gate, near the ferry-house; but it was proved by two surgeons, Mr. Box and Mr. Hester, that the child had never breathed.

Infanticide.—A child must be actually wholly in the world, in a living state, to be the subject of a charge of murder; but if it is wholly born, and is alive, it is not essential that it should have breathed; but the jury must be satisfied that the child was wholly born in-

PARK, J., (in summing up)—A child must be actually to the world at the time it was killed, or they ought not to convict the prisoner of murder.

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wholly in the world in a living state to be the subject of a charge of murder; but if it has been wholly born, and is alive, it is not essential that it should have breathed at the time it was killed; as many children are born alive, and yet do not breathe for some time after their birth (*a*). But you must be satisfied that the child was wholly born into the world at the time it was killed, or you ought not to find the prisoner guilty of murder. This is not only my opinion, but the law was so laid down in a case as strong as this, by a very learned Judge (Mr. Justice *Littledale*) at the Old Bailey. (His Lordship read the case of *Rex v. Poulton* (*b*)).

Verdict—Not guilty of murder, but guilty of concealment.

Curwood and *Talbot*, for the prosecution.

Justice and *Cooke*, for the prisoner.

[Attornies—*Walsh* and *Looker*.]

(*a*) Dr. Blundell, in his "Lectures on the Theory and Practice of Midwifery," (p. 60), says, "A woman run over by a stage was carried into St. Thomas's hospital, and died a few minutes after admission. This woman was in the end of pregnancy. By my friend Mr. Green I was requested to assist in the Cæsarian operation. In thirteen minutes from the last respiration of the mother the child was taken out. In fifteen minutes from the last respiration of the mother I began the artificial respiration. During fifteen minutes longer I continued it, ultimately resuscitating the child completely, and, had due care been taken of it, it would probably have been living still. Mr. Tompkins, of

Yeovil, a gentleman formerly of this class, and very accurate in his observations, used resuscitants for an hour and five minutes by the watch before obvious signs of life appeared, the child recovering, however, at last, and living, I believe, for some time afterwards."

(*b*) From Vol. 5, p. 329 of these Reports; see, also, the case of *Rex v. Enoch*, 1d. 539. In the case of *Rex v. Senior*, M. C. C. R. 346, where a midwife, who was grossly ignorant of the art he professed, injured the head of a child before it was completely born, and the child was afterwards completely born alive, and died of this injury, it was held to be manslaughter.

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March 5th.

REX v. COZINS.

BESTIALITY with an ewe.—It appeared that the prisoner was interrupted by one of the witnesses calling to him, and that, on being so interrupted, he withdrew himself from the animal, he being then in a state of erection.

In cases of rape, &c., the capital offence is completed if there be penetration, although there has been no emission, and the prisoner has been interrupted in the commission of the offence.

PARK, J., (in summing up).—In the former state of the law, the prisoner would have been entitled to an acquittal; but, as the law is now, if there was penetration, the capital offence is completed, although there has been no emission; however, as the proof is less than was formerly required, it behoves judges and juries to see that the proof now required is satisfactory.

Verdict—Guilty.

Walesby, for the prosecution.

[Attorney—*Edgington*.]

See the case of *Rex v. Cox*, ante, Vol. 5, p. 297.

BEFORE MR. JUSTICE PATTESON.

MITCHELL v. HUNT.

March 5th.

CASE for injuring the plaintiff's house, by improperly digging a cellar in the defendant's house, whereby a part of the plaintiff's wall sunk.

In an action on the case for injuring the plaintiff's wall by improperly digging a cellar near it, the workman who dug it is not made a competent witness for the defendant, by the stat. 3 & 4 Will. 4, c. 42, s. 26, and must therefore be released by the defendant before he can be examined.

On the part of the defendant, it was proposed to call the person employed to dig the cellar, to prove that it was properly done.

Ludlow, Serjt., objected to the evidence of this witness, on the ground of interest.

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Talfourd, Serjt., proposed that this witness's name should be indorsed on the record under the stat. 3 & 4 Will. 4, c. 42, ss. 26 and 27 (a).

PATTESON, J.—I think that this is not a case within that statute. That statute was not intended to apply to such cases as the present.

The defendant was about to execute a release, when *Ludlow*, Serjt., waived the objection.

Verdict for the defendant.

Ludlow, Serjt., and *Maclean*, for the plaintiff.

Talfourd, Serjt., and *Walesby*, for the defendant.

[Attornies—*Hester* and *Holloway*.]

(a) Set forth, ante, p. 283, n.

WORCESTER ASSIZES.—BEFORE MR. JUSTICE PATTESON.

March 7th.

HARRINGTON v. CASWELL.

In an action against a carrier for negligence in carrying a parcel, the carrier's servant is not made a competent witness for the defendant, by the stat. 3 & 4 Will. 4, c. 42, s. 26, and cannot be examined without a release.

CASE against the defendant, a common carrier from Worcester to Malvern, for negligently carrying a box of glass, so that the glass was broken.

The defence being, that the box had not received any damage while it was carried by defendant, his boy, who drove the cart, was called as a witness for the defendant.

R. V. Richards, objected that he was an incompetent witness, and referred to the case of *Mitchell v. Hunt*, as deciding that the stat. 3 & 4 Will. 4, c. 42, did not apply to this case.

Talfourd, Serjt., for the defendant, yielded to the authority of that case, and the witness was released.

The plaintiff obtained a verdict.

R. V. Richards, and *Lumley*, for the plaintiff.

Talfourd, Serjt., and *Whateley*, for the defendant.

[Attornies—*Crenwell*, and *M. & T. Elgie*.]

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REX v. THOMAS and Others.

March 5th.

ROBBERY.—The prisoners were indicted for robbing George Trinder.

A witness stated, that he had said to one of the prisoners—" You had better split, and not suffer for all of them."

If a prisoner be told, " You had better split, and not suffer for all of them;" this is such an inducement to confess as will exclude what the prisoner afterwards said.

Walesby, for the prisoner, submitted, that whatever was said by that prisoner to this witness, after that inducement, could not be given in evidence.

PATTESON, J., rejected the evidence.

Verdict—Not guilty.

Talbot, for the prosecution.

Walesby, for the prisoners.

[Attornies—*Walsh* and *Tomes*.]

See the case of *Rex v. Lloyd*, post, p. 393.

The principle upon which all this class of cases is founded, is, that by an inducement being held out to the prisoner, he may be led to suppose that he will be more mercifully dealt with if he confesses, and that he may therefore be induced to confess himself guilty of

an offence he never committed (of which instances we believe have occurred); however, in the case of *Rex v. Lloyd*, it is to be seen that no hope of favour, as to the charge upon which the prisoner was in custody, was held out.

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WORCESTER ASSIZES.

(Civil side.)

BEFORE MR JUSTICE PATTESON.

March 7th.

PORTER, Esq. v. COOPER, Esq.

An allegation that "on &c., at &c., a certain indictment was preferred at the Quarter Sessions of the Peace then and there holden in and for the said county of W., against the defendant and one T. E., which said indictment was then and there found a true bill," is not supported by the production of the original indictment with the words "true bill" indorsed on it, it being necessary that a regular record should be drawn up, and proved, either by its production or by an examined copy.

It was agreed that the trial of an indictment

at the Sessions should be postponed, the defendant agreeing to pay the costs of the day. The costs were taxed; and, at the subsequent Sessions, the counsel for the prosecution asked if there was any objections to the amount? The defendant's counsel said there was not, except as to 1*l.* 9*s.* The attorney for the prosecution said he would give up that sum, and the defendant's attorney said he would give a check for the residue. After this, the defendant was applied to for payment, and he said his attorney, who received his rents, would arrange it:—*Held*, that the indorsement on the brief was an agreement, and, also, that on this evidence the plaintiff could recover the amount of the taxed costs, minus 1*l.* 9*s.*, on the count upon an account stated.

ASSUMPSIT.—The first count of the declaration stated, that, "on the 2nd day of April, 1832, in the county of Worcester, a certain indictment was, on the prosecution of the said plaintiff, preferred at the Quarter Sessions of the peace then and there holden in and for the said county of Worcester, against the said defendant and one Thomas Evans, which said indictment, was then and there, to wit, at the same Quarter Sessions, found a true bill, and which said indictment follows in these words; that is to say,—Worcestershire, to wit. The jurors for our lord the king," &c. (setting out the whole of the indictment, which was for obstructing a highway, verbatim). This count went on to state, that more than twenty days before the next subsequent Sessions, the defendant and T. E. had notice of this indictment, and ought to have been prepared to plead to it at the sitting of the court, at that Sessions, on Wednesday the 4th of July; but that they were not prepared so to do, and that in consideration of the plaintiff, who was the prosecutor of the indictment, consenting to its being traversed to the next Sessions, the defendant agreed to pay the costs of the day;

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and although the plaintiff did consent, and the costs of the day amounted to 43*l.* 8*s.*, the defendant refused to pay them. The next five counts stated the finding of the indictment exactly in the same terms as the first count, except that, instead of the indictment being again set out verbatim, it stated—"which said last-mentioned indictment was and is to the like tenor as that hereinbefore set out in the said first count." These counts varied the statement of the agreement between the parties. The seventh count was upon an account stated. Plea—General issue.

It appeared from the evidence of Mr. Workman, the attorney for the plaintiff, that he was at the Worcester Sessions, and that the Sessions began on the 2nd of July, 1832; and that the defendant, Dr. Cooper, not being ready to plead to the indictment mentioned in the declaration (he wishing to plead to the jurisdiction of the Court), the counsel for the prosecution, Mr. *Lee*, pressed the Court to decide against Dr. Cooper, the then and present defendant, as not having pleaded, unless he would consent to pay the costs of the day; and that, after Mr. Beale, Dr. C.'s attorney, had gone out of Court, and consulted him, the proposition was agreed to, and an indorsement was made on the briefs, and signed by Mr. *Lee*, as counsel for the present plaintiff, and by Mr. *Lumley* as counsel for Dr. Cooper.

One of the briefs, with the indorsement, was offered in evidence. The back sheet of the brief bore an agreement stamp.

Maule, for the defendant.—I must object to this indorsement on the brief being read; it is mere instructions for an order of Sessions.

Talfourd, Serjt., for the plaintiff.—It is an agreement made between the parties.

Maule.—The parties were to be bound by the order of the Court, which was intended to be drawn up.

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Curwood, for the defendant.—Suppose that these were instructions for preparing a deed, which was afterwards perfected, could any action be maintained on the instructions? Here an order of Sessions was drawn up on this very consent, indorsed on the back of the brief.

PATTESON, J.—A deed executed between the same parties would prevent the instructions from being read, but here there is no other instrument between the parties.

The indorsement on the brief was read. It was as follows:—"Traversed to the next Sessions by consent, the defendant paying the costs of the day, including the counsel's fees, the prosecutor giving to the defendant a copy of his replication one month before the next Sessions.

"W. G. Lumley.

"F. V. Lee."

It was further proved by Mr. Workman, that the bill was taxed by Mr. Best, the deputy clerk of the peace for the county of Worcester, and that, after taxation, it amounted to 43*l.* 8*s.*

To prove the allegations in the declaration respecting the finding of the indictment, Mr. Best, the deputy clerk of the peace, was called. He produced the indictment itself, with the words "a true bill" written on the back; but no record had been made up, and there was no caption to it.

Maule, and *Curwood*, for the defendant.—The declaration states, that the indictment was found at a particular Sessions. The production of the indictment does not shew at what Sessions it was found. The case of *Rex v. Smith* (a) must govern the present.

(a) 8 B. & C. 341, and Carr. Supp. p. 189. In that case the indictment, which was for a conspiracy, alleged, that, "at the Court

Talfourd, Serjt.—This case is distinguishable from the case of *Rex v. Smith*. Here, the finding of the indictment is only stated by way of inducement, and there is no prout patet per recordum.

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PATTERSON, J.—In the case of *Rex v. Smith* the language of Lord *Tenterden* is very strong. His Lordship says, “ In order to prove the finding of an indictment, it has always been the practice to have the record regularly drawn up, and to produce an examined copy. If any other evidence were allowed, I do not know how we could say that a conviction or acquittal might not also be proved by the minutes in the book kept by the clerk of the peace. That would be to break through all the rules of evidence, which is always a dangerous course.” I think that the allegations at the commencement of each of the special counts, respecting the finding of the indictment, are not proved.

R. V. Richards, for the plaintiff, proposed to go on the account stated.

On this point, Mr. Workman further said—“ I remember the indictment being called on at the Michaelmas Sessions, Mr. *Godson* and Mr. *Lee* were counsel for the prosecution. Mr. *Godson* wished to know if there was any objection to the allowance of costs. Mr. *Beale* was at that time sitting by Mr. *Lumley*. Mr. *L.* said, there

of Quarter Sessions, holden &c., an indictment against H. S., for a certain felony therein mentioned, was duly preferred to and found by a certain grand jury of the county then and there duly assembled in that behalf;” it was held, that this allegation must be

proved by proof of a record regularly drawn up; and that the minute-book kept by the deputy clerk of the peace could not be received as evidence of the finding of the bill, although no record had in fact been drawn up.

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was no objection to two sums of 1*l.* 1*s.*, and 8*s.*, and something was then said about sending the bill back to Mr. Best. I said there was no need, as I would give up the sums in dispute. Mr. Beale stated that he would give his check for the amount. I said there was no occasion to do it then, his word was sufficient. He inquired at what inn I was staying, and said he would send his son to pay it. On the 19th of November I saw the defendant, and asked him to pay it. He said, if I applied to Mr. Beale, who received his rents, he would either arrange or pay it. I do not exactly recollect, whether he used the word 'pay,' or the word 'arrange.'"

Maule, for the defendant.—This is not a statement of account between the plaintiff and the defendant, and the finding of a particular sum to be due. Suppose the plaintiff and defendant had met; and the plaintiff had said—There are taxed costs directed to be paid by you to me, by an order of Court; and the defendant had said—There are, and my agent will pay them; that would not be an account stated, because it would not be an acknowledgment of debt, for which an action would lie.

Curwood.—The right of the plaintiff is founded on the order of Sessions, and no action will lie on an order of Sessions, or an allocatur of the Master. As to this being an account stated, the terms of the count are, that the defendant was indebted to the plaintiff "for money found to be due from the said defendant to the said plaintiff on an account then and there stated" between them. There is no evidence of any certain sum demanded on one side, and admitted on the other.

PATTESON, J.—From what took place at the second Sessions, the defendant must have known what it was. It is asked, what is the objection to the amount; and the

counsel for the defendant says, 1*l.* 1*s.*, and 8*s.* The plaintiff's attorney says, he will waive that; and the defendant's attorney says, he will give a check. I will leave the case to the jury upon the account stated, and give leave to Mr. *Maule* to move to enter a nonsuit, if the Court should think there was no evidence to go to the jury on the account stated.

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Verdict for the plaintiff—Damages 4*l.* 9*s.* on the last count (*a*); with leave to move.

Talfourd, Serjt., and *R. V. Richards*, for the plaintiff.

Maule, and *Curwood*, for the defendant.

[Attornies—*Workman*, and *Beale*.]

IN the ensuing term, a motion was made in the Court of King's Bench, pursuant to the leave given, and a rule to shew cause was granted; which, after argument, was discharged.

(*a*) See the note to the case of *p.* 325, and the authorities there *Payne v. Jenkins*, ante, Vol. 4, referred to.

DOE on the Demise of COYLE, Clerk, *v.* COLE.

March 10th.

EJECTMENT to recover a house at Blockley.

It appeared that the lessor of the plaintiff was the

The master of an ancient endowed school is entitled to the school house,

unless he has been in due manner removed from his office by those having authority to do so.

The neglecting of the scholars would be a good ground of amotion.

The vicar of the parish cannot recover the school-house by ejectment, although it may have been built on what is evidently part of the churchyard, if it appear that the house was built on the site of a very old school-house, the site of which might have been granted before the disabling statutes; but if a part of the house is built on ground taken from the churchyard recently, the vicar may remove that part.

Where a vicar brings ejectment claiming in right of his vicarage, a letter written by a former vicar is admissible in evidence for the defendant; and a witness for the lessor of the plaintiff may be asked as to what is inscribed on a tablet fixed up in the church.

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vicar of Blockley, and that the house in question was a school-house, the defendant being the schoolmaster. It was contended, on the part of the lessor of the plaintiff, that this school-house was built on a part of the churchyard at Blockley, and, therefore, belonged to him; and, from a plan produced, it seemed that the house was built in the churchyard, but quite at the edge of it; but it was proved, that this house had been built on the site of a very old school-house, which had been taken down in the year 1826, and the builder stated that the present house was not exactly on the site of the former house, as a portion of it was built on ground which up to that time had been part of the churchyard. It appeared that the lessor of the plaintiff had given the defendant a notice to quit in seven days.

Curwood, for the defendant, proposed to ask one of the witnesses for the lessor of the plaintiff, whether there was not in Blockley church a tablet, on which was inscribed something respecting the school, and what it was.

R. V. Richards, for the defendant.—The proper mode of proving what is on the tablet would be to put in a copy of the inscription.

Carrington.—In the case of *Rex v. Fursey (a)*, it was held, that the contents of a placard which was affixed to the walls of the Cold Bath Fields' prison might be proved by parol evidence.

PATTERSON, J.—I think that the witness may be asked what is inscribed on the tablet.

The witness stated, that the words of the tablet were—

(a) Ante, p. 81; see also the case of *Brown v. Woodman*, ante, p. 206.

"The owner or owners of Upton lands shall appoint the schoolmaster for ever, he paying 10*l.* a-year out of those lands;" but the witness afterwards stated, that he was not sure that the words were not "shall appoint a person to teach," &c. He also stated, that Lord Northwick was the owner of the Upton lands.

The defence was, that the defendant was the master of an endowed free-school, to which this house appertained; and that the defendant therefore could not be removed from his office of schoolmaster without a sufficient cause; and that, as no regular amotion had been made, he could not be deprived of the possession of the house.

To shew that the defendant had been appointed master of the school, and also to shew that it was an endowed free-school, the defendant's counsel proposed to put in a letter written to the defendant by the Rev. William Boughton, the predecessor of the lessor of the plaintiff, as vicar of Blockley.

Talfourd, Serjt., for the lessor of the plaintiff.—I submit, that what a former vicar has said is not evidence.

PARTESON, J.—Your client claims this house as vicar, and in right of his vicarage. The former vicar was, as you put it, owner of the freehold; what he said or wrote is therefore evidence. The defendant is confessedly schoolmaster, and has not been removed from his office. It is difficult to say how you can maintain your ejectment for the site of the old school-house; but as to the little bit of ground, taken in the year 1826, there seems to be no dispute.

The letter, which was dated December 27th, 1828, was read, it contained the following passage:—"I have to inform you, that the trustees have preferred the application on behalf of yourself and wife, and appointed you both to the superintendence of the charity and Sunday schools at this place."

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A letter from the lessor of the plaintiff to Mr. Frankum, the attorney for the defendant, dated March 4th, 1833, was read. It contained the following passage:—"I wish to state to you, that there is a free-school in this parish, with fixed payments to a schoolmaster and mistress from different bequests. Some time before I became vicar of Blockley, which was in August, 1831, Sunday schools, supported by voluntary subscriptions of the inhabitants, were placed under the superintendence of the master of the free-school."

Talfourd, Serjt., in his reply, contended that the site of the old school-house was parcel of the churchyard.

PATTESON, J., (in summing up).—The question is, whether the old school-house was parcel of the churchyard. If it were, it appears by the plan to be quite at one corner. If it was not parcel of the churchyard, the defendant is entitled to hold it, as he has not been amoved from his office of schoolmaster. The neglecting of the scholars would be a good ground of amotion by those who had power to amove him, but that has not been done. With respect to that part of the churchyard taken in the year 1826, the lessor of the plaintiff is entitled to recover it, as that could not be conveyed; but, with respect to the residue, the lessor of the plaintiff cannot succeed, unless it be parcel of the churchyard. We have no evidence as to the period at which this school was founded. The former house is stated to have been very old; and if the old site was parcel of the churchyard, but had been conveyed away before the passing of certain old acts of Parliament (a,) it would properly belong to the schoolmaster, and not to the vicar.

(a) The stats. 1 Eliz. c. 19; 13 Eliz. c. 10; 14 Eliz. c. 11 & 14; 18 Eliz. c. 11; 43 Eliz. c. 4. In the case of *Wilkinson v. Malin* 1 C. & M. 636, it was held, that a trust to apply certain funds "towards the repairs of the church of Willoughby, the pay

Talfourd, Serjt. — We cannot sustain our ejectment for the site of the old school-house.

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Verdict for the plaintiff.

PATTESON, J.—I have made this note—" Verdict for the plaintiff. Execution to be limited to that part erected in 1826, or since, and not on the old site."

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Talfourd, Serjt., and *R. V. Richards*, for the lessor of the plaintiff.

Curwood, and *Carrington*, for the defendant.

[Attornies—*Doyley*, and *Frankum*.]

ment of the fifteenths, and the relief of the poor of Willoughby; buying of armour and setting forth soldiers, and repairing Sawbridge bridge, within the parish of Willoughby," is of a public nature; and, therefore, an act done by a majority of the trustees assembled for that purpose is valid. That case also decides, that building a school-house and edu-

cating poor children is within the meaning of the trust for the relief of the poor; and it was also there decided, that the appointment of a schoolmaster elected by a majority of the trustees, at a meeting assembled for the purpose of the election, need not be in writing; and that he cannot be dismissed, except by a majority of the trustees at a similar meeting.

(*Crown Side.*)

BEFORE MR. JUSTICE PARK.

REX v. BREWER.

March 8th.

FORGERY.—The first count of the indictment charged, that the prisoner did "falsely make, forge, and counter-

In an indictment for forgery, a count, which, since the stat. 1 Will. 4,

c. 66, charges that the prisoner "did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, and did willingly act and assist in the false making, forging, and counterfeiting" a bill of exchange, is good; as are counts charging that he did "utter and publish as true," and did "offer, dispose of, and put away" the bill.

A prisoner was in custody on a charge of forgery, but was not allowed even to see his wife: he wrote to a friend, "to ask Mr. G., or some other solicitor, whether the punishment was the same, whether the names forged were those of real or of fictitious persons." Mr. G. was not his attorney:—*Held*, that this was not a privileged communication.

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feit, and did cause and procure to be falsely made, forged, and counterfeited, and did willingly act and assist in the false making, forging, and counterfeiting a certain bill of exchange," (setting it out), with intent to defraud the Stourbridge Canal Company. The second count charged, that the prisoner did "utter and publish as true" a certain forged bill of exchange, knowing it to be forged. And the third count was that he did "offer, dispose of, and put away" a certain forged bill of exchange, &c. There were many counts varying the intent to defraud, and also counts describing the bill under the stat. 2 & 3 Will. 4, c. 123, s. 3 (a), instead of setting it out.


F. V. Lee, for the prisoner.—This indictment is in the form in which indictments were before the passing of the stat. 1 Will. 4, c. 66. Since that statute, indictments for forging bills of exchange ought not to contain the words "counterfeit, and act and assist in the false making," &c., as those words are not in the stat. 1 Will. 4, c. 66, though they were in former forgery acts. The same objection applies to the second and third counts, as the stat. 1 Will. 4, c. 66, does not contain either of the phrases, "publish as true," or "put away."

PARK, J.—I am of opinion that this indictment is good. —The first count charges the prisoner with forging, the second with uttering, and the third with offering and disposing, which is correct; and that is not rendered bad by a great deal more being stated, which is not applicable to the enactments now in force.

(a) By which, 'in order to prevent justice from being defeated by clerical or verbal inaccuracies,' it is enacted, "That in all informations or indictments for forging or in any manner uttering any instrument or writing, it

shall not be necessary to set forth any copy or fac-simile thereof, but it shall be sufficient to describe the same in such manner as would sustain an indictment for stealing the same; any law or custom to the contrary notwithstanding."

It appeared that the prisoner was in custody at Stourbridge, and that, while he was so, he wrote a letter to Mr. Payne, a clerk of Messrs. Foster. This letter did not contain any thing of importance; but the prisoner afterwards wrote on it in pencil, as follows:—"Would you be kind enough to ask Mr. Grazebrook, or any other solicitor, whether the punishment of forging a bill is the same where the names of the parties are entirely fictitious, as where the names are those of real persons. The gentlemen have been kind enough to allow me to see my children, but not my wife till after Monday."

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Whateley, for the prosecution, proposed to give this writing in evidence.

Carrington, for the prisoner.—I submit that this is a privileged communication. What a prisoner says to his attorney by words is privileged, and this is the privilege not of the attorney but the client; and the privilege has also been held to extend to an interpreter, who interprets between a client and his attorney (*a*). I submit that the same principle applies in the present case. Here the prisoner is in custody, and he is not allowed to see his wife. His mode of communicating with his attorney can therefore only be by writing, either directly to the attorney himself, or to some other person, desiring him to go to the attorney.

PARK, J.—In the case you put of an interpreter, I should be inclined to decide with you; but this is certainly not a privileged communication, as the relation of attorney and client did not exist between Mr. Grazebrook and the prisoner; and it does not appear that Mr. Grazebrook ever acted as his attorney afterwards (*b*). It is merely the prisoner asking a friend to make an inquiry as to what the

(*a*) In the case of *Du Barre v. lard v. Harris*, ante, Vol. 5, p. *Livette*, Peake's N. P. C. 78. 592.

(*b*) See the case of *Doc d. Shel-*

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law is on a particular point; and he does not even limit the inquiry to Mr. Grazebrook, for he says, inquire of him, or of any other solicitor.

The paper was read.

Verdict—Guilty.

Whateley, Godson, and R. Scott, for the prosecution.

Carrington, and F. V. Lee, for the prisoner.

[Attornies—*Roberts & Son, and Gilham.*]

March 11th.

REX v. WARD.

On an indictment for perjury, committed in the hearing of a parish appeal at the Quarter Sessions, the production of the Sessions'-book is not sufficient proof that the appeal came on to be heard; and a regular record must be made upon parchment, the same as on a return to a certiorari, and that record or an examined copy must be produced.

PERJURY.—The indictment stated, that, “at the General Quarter Sessions of the Peace, held for the county of Worcester, at the Guildhall of Worcester, before Sir C. S. Smith, Bart., &c., a certain appeal, in which the churchwardens and overseers of the poor of the parish of Naunton Beauchamp, in the said county, were appellants, and the churchwardens and overseers of the poor of the parish of Holy Cross, Pershore, in the said county, were respondents, in due form of law came on to be heard.” The indictment then went on to state, that, on the hearing of the appeal, the defendant swore that a person named John Need had been hired by him as a servant for fifty-one weeks and five days. This was charged to be false.

To prove the allegation that the appeal was heard, Mr. Best, the deputy clerk of the peace, was called, to produce the Sessions-book.

Justice, for the defendant.—This is not the proper way of proving the appeal to have been heard. A regular record on parchment ought to be made up. That was held in the case of *Rex v. Smith (a)*.

(a) Cited, ante, p. 356.

F. V. Lee, for the prosecution.—The case cited was the case of an indictment, and not of an appeal.

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Mr. Best stated that it was not the practice to draw up a record on parchment, unless it was bespoke.

PARK, J.—Mr. Best, would you not, if applied to, have drawn up a record of this appeal on parchment, in the same way that you would if you were making a return to a certiorari.

Mr. Best.—Yes, my Lord.

Mr. Bellamy, the clerk of assize, stated, that, at the assizes, the judgment roll is not the record; but that, from it, and from the indictment, a record can be made up.

PARK, J.—I am of opinion that this is a fatal objection. There is certainly a great difference between the case of an indictment and that of an appeal; yet still an appeal is a matter before a Court of record, and we ought to consider the importance of having the proper evidence of it, for, if it was not heard before a Court of competent jurisdiction, perjury cannot be committed on the hearing of it. The defendant must be acquitted.

Verdict—Not guilty.

F. V. Lee, for the prosecution.

Justice, and *W. J. Alexander*, for the prisoner.

[Attornies—*Woodward*, and *Cameron*.]

See the case of *Porter v. Cooper*, ante, p. 354.

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STAFFORD ASSIZES.

(Crown side.)

BEFORE MR JUSTICE PATTESON.

March 15th.

REX v. BUTLER.

An attempt to commit a misdemeanour created by statute is itself a misdemeanour. A count in an indictment charged that a defendant "did attempt to assault" a girl, "by soliciting and inducing her" to place herself in an indecent attitude, he doing the like:—*Held*, that such a count was bad.

ASSAULT.—The first count was a count for an assault with intent to commit a rape on Sarah Vernon. The second count charged, that the said Joseph Butler "did attempt to assault the said Sarah Vernon, by soliciting, and persuading, and inducing her, the said Sarah Vernon, to lie down upon a certain bed, in the dwelling-house of him the said J. B., there situate, and getting upon the body of her the said S. V., and then and there placing his naked private parts close to the naked private parts of the said S. V.;" against the peace, &c. The third count was for a common assault.

F. V. Lee, for the prisoner.—I submit that the second count is bad; first, because an attempt to commit a statutory misdemeanour is not a misdemeanour.

PATTESON, J.—An attempt to commit a misdemeanour created by statute is a misdemeanour itself (*a*). I recollect a case where a man had gone to an engraver to get him to engrave a plate, to forge foreign bills of exchange. At that time it was only a misdemeanour (*b*) to engrave such

(*a*) See the case of *Rex v. Harris*, ante, p. 129.

(*b*) Under the stat. 43 Geo. 3, c. 139, s. 2. That provision is however repealed by the stat. 1 Will. 4, c. 66, which makes the

offence of engraving such plates felony, punishable with imprisonment, or transportation for any term not exceeding fourteen years, nor less than seven years.

plates. I drew the indictment against him for soliciting the engraver to engrave the plate; and the prisoner was tried and convicted on it.

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F. V. Lee.—This count does not allege that the prosecutrix was between the ages of ten and twelve.

PATTESON, J.—I think that the count is not good; but the case must proceed on the last count.

Verdict—Guilty of a common assault.

Greaves, for the prosecution.

F. V. Lee, for the prisoner.

[Attornies—*Jones*, and *Passman*.]



REX v. GARRATT and Others.

March 15th.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 29, s. 30 (a), for destroying conies in the night-time, in a ground lawfully used for the breeding of conies.

Destroying rabbits in the night time in a rick-yard in which they were kept, is not a misdemeanour under the stat. 7 & 8 Geo. 4, c. 29, s. 30.

It appeared that the prosecutor kept rabbits, which ran about loose in his rick-yard, and that these rabbits were destroyed by poison in the night-time.

Godson, for the prisoners.—I submit that this is not a case within the act of Parliament. The enactment on

(a) By which it is enacted, of hares or conies, whether the
 "That if any person shall unlawfully and wilfully in the night-time take or kill any hare or coney in any warren or ground lawfully used for the breeding or keeping the same be inclosed or not, every such offender shall be guilty of a misdemeanour, and, being convicted thereof, shall be punished accordingly."

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which this indictment is framed only applies to warrens, and to places similar to warrens, but which could not legally be called warrens (*a*).

PATTESON, J.—This place was not used exclusively for rabbits; and it appears that the prosecutor merely kept some rabbits in his rick-yard. If the yard had been kept exclusively for rabbits, I should have doubted it; but I think that this case is clearly not within the act of Parliament. The act applies to places commonly called rabbit warrens, and not to places where a few rabbits may be kept. The prisoners must be acquitted.

Verdict—Not guilty.

F. V. Lee, for the prosecution.

Godson, for the prisoners.

[Attornies—*Fellows*, jun., and *Hayes & Hinchcliffe*.]

(*a*) As to law respecting warrens, see Com. Dig. tit. "*Chase*;" *case of the Duke of Devonshire v. Lodge*, 9 D. & R. 875. *Manwood's Forest Laws*, and the

March 17th.

REX v. TOMLINSON.

In an indictment for murder, where the death is alleged to have been caused by a wound, it is not necessary to describe either the length, breadth, or depth of such wound.

MURDER.—The prisoner was charged with the murder of Mary Evans. The first count of the indictment stated that the prisoner caused the death of the deceased by beating and kicking her with his hands and feet; and that with a stone, "in and upon the right side of the head" of the deceased, the prisoner inflicted "one mortal wound and bruise of the length of three inches, and of the breadth of three inches," and not stating the depth. The second count alleged the death to have been caused by beating and kicking; and the third count by drowning.

It appeared from the evidence that the death of the deceased was caused by a wound on the head inflicted with a large stone.

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Godson, for the prisoner.—The only cause of death proved is the wound; and there was but one wound. I therefore submit that this indictment is bad, as it does not state the depth of the wound. Sir William Russell says (a), that “it has been considered as necessary to state in what part of the body the wound was given, and also to state the length and depth of it;” and for this he cites the authority of Lord Hale (b). I am aware, that, in the case of *Rex v. Mosley* (c), it was held that where there were several wounds, it was not necessary to state the length, breadth, and depth; but the distinction I draw between that case and the present is, that there were several wounds, and here only one; and if such able pleaders as Mr. Justice *Holroyd* and Mr. Justice *Littledale* thought an indictment bad where there had been several wounds which were not described, your Lordship would hardly consider an indictment good which omitted to describe the wound where there was one only.

PATTESON, J.—If the depth of the wound was stated, it need not be stated accurately. I do not see any reason why it should be described. According to the report of the case of *Rex v. Mosley*, the Judges say that many of the old precedents omit the length and breadth altogether.

(a) 1 Crim. & Misd. 467.

(b) 2 H. P. C. 186. Lord Hale there says:—“Regularly, the length and depth of the wound is to be shewed; but this is not necessary in all cases, as, namely, where a limb is cut off.”

(c) R. & M. C. C. 97. In that case there were several wounds,

and it was held, by *Abbott, C. J., Best, C. J., Alexander, C. B., Graham, B., Bayley, J., Park, J., Burrough, J., Garrow, B., Hullock, B., and Gaselee, J.*, to be unnecessary to describe the length, breadth, or depth of the wounds; *Holroyd, J.*, and *Littledale, J.*, being of a contrary opinion.

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Godson.—There are many things which must be stated in an indictment for murder that need not be proved accurately, such as the position of the wound.

PATTESON, J.—I do not know how that may be hereafter. It frequently happens, in the reports of the crown cases, that the decision only is known, but the grounds of the decision are not known. However, as my Brother *Park* was present at the decision of the case of *Rex v. Mosley*, I will confer with him.

His Lordship, having conferred with Mr. Justice *Park*, said:—"My Brother *Park* recollects the case perfectly well, and informs me that it was very much discussed; and that the ground of the decision was, that, as common sense did not require the length, breadth, and depth of the wounds to be stated, it was not necessary that they should be stated; that case is, therefore, a direct authority against the objection, and in consequence the objection cannot prevail.

Verdict—Guilty.

Corbet, and *Whateley*, for the prosecution.

Godson, for the prisoner.

[Attornies—*Brookes & Smallwood*, and *Smith*.]

REX v. SHAW.

A. was in custody on a charge of murder. B., a fellow prisoner, said to him,

"I wish you would tell me how you murdered the boy—pray split." A. replied, "Will you be upon your oath not to mention what I tell you?" B. went upon his oath that he would not tell. A. then made a statement:—*Held*, that this was not such an inducement to confess as would render the statement inadmissible.

If two persons fight, and one overpower the other, and knock him down, and put a rope round his neck, and strangle him, this will be murder.

MURDER.—The prisoner, who was a lad, aged sixteen, was charged with the murder of a younger boy, named John Holdcroft, by strangling him.

After the prisoner had been committed, another prisoner said to him, "I wish you would tell me how you murdered the boy—pray split."

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Justice, for the prisoner, submitted, that this was an inducement to confess, and cited the case of *Rex v. Thomas (a)*.

PATTESON, J.—I thought in that case that an inducement was held out to the prisoner, that it would be better for him to confess; but that is not so here.

The witness said, "The prisoner said to me, 'Will you be upon your oath not to mention what I tell you.' I went upon my oath, that I hoped if I told that I might never stir out of that place again. The prisoner then said, 'We quarrelled about some money I had won from him; he wanted it back, and I would not give it to him; he struck me, and I knocked him down; he got up and I knocked him down again, and kicked him; and then I put a rope round his neck, and dragged him into the ditch.'"

PATTESON, J., (in summing up).—These oaths are very wrong and wicked, but still they are not binding; and every person, except counsel and attornies, is compellable to reveal what they may have heard; and counsel and attornies are only excepted, because it is absolutely necessary, for the sake of their clients, that communications to them should be protected. However, if you even believe the prisoner's statement made to this witness, that will not prevent the crime from being murder, and reduce it to manslaughter. If two persons fight, and one of them overpowers the other, and knocks him down, and then puts a rope round his neck, and strangles him, that is

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murder. The act is so wilful and deliberate that nothing can justify it.

Verdict—Guilty.

C. Phillips, and *Greaves*, for the prosecution.

Justice, for the prisoner.

[Attornies—*Hales*, and *C. Flint*.]

BEFORE MR. JUSTICE PARK.

MELLOR v. BADDELEY and Another.

A person convicted of a trespass under the Game Act, 1 & 2 Will. 4, c. 32, underwent the sentence of imprisonment under that conviction, and did not appeal against it:—
Held, that that conviction was an answer to an action against the informer for a malicious prosecution.

CASE.—The first count of the declaration stated, that the plaintiff “is a good, true, and faithful subject, &c., and hath never been guilty of poaching, or unlawfully committing any trespass in search of game, &c.; yet, that the defendants, contriving &c., on the 8th of April, 1833, appeared before one John Sneyd, clerk, one of the justices, &c., and maliciously, and without any reasonable or probable cause, caused a certain false and malicious information to be exhibited against the plaintiff, for that he (the plaintiff) did, on the 7th of February, 1833, unlawfully commit a trespass, by entering and being, in the day-time, upon a certain common or piece of land, in the possession and occupation of Daniel Bird Baddeley, there, in search of game; and, upon such information, maliciously, and without any reasonable or probable cause, caused the said John Sneyd to grant his summons for the summoning of the plaintiff before him, the said John Sneyd, on the 17th of April then next, to answer to the said information. That the defendants caused the plaintiff to be served with said summons; that the defendants, on the 17th of April, 1833, maliciously, and without any reasonable or probable

cause, caused the said John Sneyd wrongfully and illegally to convict plaintiff of supposed offence in information specified, and to adjudge that he should forfeit 2*l.*, together with 1*l.* 10*s.* for costs, and, in default of payment, be imprisoned for two calendar months; and that the defendants maliciously, and without probable cause, caused the said John Sneyd to grant his certain warrant of commitment, whereby the constable of Stoke-upon-Trent was commanded to convey the plaintiff to gaol, and the keeper of the common gaol was commanded to receive and keep the plaintiff in the said gaol for two calendar months, unless the penalty and costs should be sooner paid; and that the defendants maliciously, &c., caused said plaintiff, under and by virtue of said commitment, to be arrested, and to be conveyed to gaol, and wrongfully and maliciously caused him to be imprisoned, without probable cause, for two calendar months; at the expiration of which said time the plaintiff was duly discharged and fully released from the said gaol.

The second count stated, that the defendants, contriving as aforesaid, on the 17th of April, 1833, charged plaintiff with having committed an offence punishable by law, to wit, with having committed a trespass, (as in the information set out in first count); and that defendants, upon the last-mentioned charge, maliciously, and without probable cause, procured John Sneyd to grant a warrant of commitment, whereby &c., (as in the first count), and that the defendants, under and by virtue of such commitment, caused plaintiff to be arrested and imprisoned, (as in first count).

Third count.—That the defendants, on the 17th of April, maliciously, and without probable cause, procured the plaintiff to be arrested, under and by virtue of another warrant of commitment, whereby the keeper of the gaol was commanded to receive and keep the plaintiff in his custody for two calendar months, unless certain sums of money, to wit, 2*l.* and 1*l.* 10*s.*, should be sooner paid;

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and that the defendants maliciously, and without probable cause, procured the plaintiff to be imprisoned, under and by virtue of the said warrant, for two calendar months.

Fourth count.—That the defendants, contriving to cause plaintiff to be unlawfully imprisoned &c., on the 17th of April, 1833, wrongfully, and without any probable cause, charged the plaintiff with having committed a certain other offence, punishable by law, to wit, a trespass, (as in first count), and upon such last said charge, wrongfully, and without probable cause, under and by virtue of a certain warrant or commitment, caused the plaintiff to be arrested and imprisoned for two calendar months.

Greaves, for the plaintiff, stated in his opening that the defendants, on the 26th of March, had laid an information before Ralph Bourne, Esq., a magistrate, against the plaintiff for trespassing on the 25th of February, 1833, in pursuit of game, upon Wetley Moor, which was alleged to be in the possession of Daniel Bird Baddeley; to which information the plaintiff appeared, and objected that it could not be supported, as Wetley Moor was a common and uninclosed land; and that the possession, if any, was in the lords of the manor, Sir George Chetwynde and Miss Sparrow, who alone, under the 30th section of the Game Act, 1 & 2 Will. 4, c. 32, could support an information: whereupon Mr. Bourne dismissed the case, and ordered the defendants to pay the costs. On the 8th of April, another information was laid before Mr. Sneyd, for a trespass on Wetley Moor, on the 7th of February, and in it the possession was also laid in Daniel Bird Baddeley. This information was heard on the 17th of April, and the same objection again taken; but Mr. Sneyd overruled it, and ordered the plaintiff to pay 2*l.*, and 1*l.* 10*s.* costs, or to be committed for two calendar months; and that the plaintiff, not having paid the money, was committed, and imprisoned for two calendar months; and being too poor to find sureties to enable him to appeal, he did not appeal, and, as the

commitment took place more than two calendar months before the sessions, the sentence expired before he could have an opportunity of appealing. He submitted, that the dismissal of the previous information by a competent tribunal was abundant evidence to shew the want of probable cause; and that the going ten miles to a magistrate, and charging an offence antecedent to the one charged before Mr. Bourne, was ample evidence of wilful and deliberate malice; and that the proceedings were not only illegal, but must have been known to be so by one of the defendants, who was an attorney.

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The previous information, and dismissal thereof, before Mr. Bourne was proved, and evidence was gone into to shew that Wetley Moor was a common, and not in the occupation of Mr. D. B. Baddeley.

Talfourd, Serjt., and *R. V. Richards*, for the defendants.—There was an information laid before Mr. Sneyd, as has been stated by Mr. *Greaves*; and we can prove that there was a conviction thereon, which remains still in full force; and that no appeal has ever been entered against that conviction; now, that conviction so existing, whether good on the face of it or not, is conclusive evidence of probable cause. To support an action of this kind, the plaintiff must shew that the proceedings have terminated in his favour. *Whitworth v. Hale* (a); *Matthews v. Dickenson* (b).

Greaves, and *F. V. Lee*, *contrà*.—First, the conviction is not admissible in evidence for the defendants, as it was procured by the evidence of one, and at the instigation of the other. *Smith v. Rummens* (c); *Hathaway v Barrow* (d). It is a universal principle that no proceeding

(a) 2 B. & Adol. 695.

(b) 7 Taunt. 399.

(c) 1 Camp. 9.

(d) 1 Camp. 151, and cases collected 1 Stark. Evid. 235, 236, 237, and in the notes.

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in a criminal case is evidence for a party in a civil suit, who either was or might have been examined in support of it, otherwise parties would in effect be enabled to give evidence in their own behalf in their own cause; and besides, the defendant before a magistrate has no right to be examined on oath, and consequently the evidence must necessarily be all on one side. Again, if a conviction be admissible to defeat this action, it would be equally admissible to support an action of trespass against the present plaintiff; in other words, the party would be allowed to manufacture evidence for himself. Moreover, it is well settled that no proceeding can be evidence for one side in one event, which would not be evidence for the other side in another event; the benefit must be mutual. Now, here, there can be no mutuality. Suppose Mr. Baddeley brought trespass against the plaintiff for the case heard before Mr. Bourne, the record of the dismissal of the information would not be admissible for the plaintiff in this action, in order to defeat such action of trespass. Neither are the parties in this case the same as before the magistrate. Secondly.—The conviction is bad; and that being so, it is no answer to this action. If trespass is brought against a magistrate, he must put in a valid conviction to justify himself; a fortiori, therefore, there must be a valid conviction to justify the party who procured it. The reason why a conviction is evidence for a magistrate is, that it is the record of a judicial proceeding, and the Courts give credit to it as having been regularly made, until the contrary be shewn; but that reason does not apply to the party procuring the conviction. In this case trespass would not lie, because all the defendants did was procuring the conviction and commitment under a warrant, for which case is the only remedy. The cases of *Massey v. Johnson* (a), and *Gray v. Cookson* (b), on the statute 43 Geo. 3, c. 141, shew that such an action will lie, because in

(a) 12 East, 67.

(b) 16 East, 13.

them the conviction subsisted, and had not been appealed against. *Aked v. Stocks* (a) is nearly similar to this case; but the case of *Whitworth v. Hale* is not in point; besides, if this objection be good, it is on the record, and the defendants should have demurred.

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Talfourd, Serjt., in reply.—Whether the conviction is good or not, it is still in existence. The case of *Smith v. Rummens* is very different from the present. This is an action in case, and the conviction is an answer to the averment of want of probable cause.

PARK, J.—I have heard the case thoroughly, because Mr. *Greaves* has cited a great number of authorities. I am of opinion that the action cannot be maintained without shewing that the conviction was quashed. Here is an act of Parliament which inflicts a penalty, and still the party is not without a remedy, for the act gives the power of appeal, and the Court may thereon make such order as they think fit. Can a party in the face of a conviction bring an action? I think not.

Nonsuit.

Greaves, and *F. V. Lee*, for the plaintiff.

Talfourd, Serjt., and *R. V. Richards*, for the defendant.

[Attornies—*Jones*, and *Baddeley*.]

In the ensuing term, *Greaves* moved to set aside the nonsuit; but the Court of Exchequer refused a rule (b).

(a) 4 Bing. 509; 1 Moo. & we are indebted to the kindness of
Payne, 346. one of the learned counsel en-
(b) For the report of this case gaged in it.

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REX v. WYLDE.

On the trial of an indictment for perjury, where the perjury was alleged to have been committed before a magistrate, the written deposition of the defendant taken down by the magistrate was put in to prove what he then swore. After this, it was proposed to call the attorney for the prosecution, to prove some other matters that the defendant then swore, which were not mentioned in the deposition:—*Held*, that this could not be done.

All the witnesses were ordered out of Court. A witness for the prosecution remained in Court. The Judge would not allow him to be examined.

PERJURY.—The perjury was alleged to have been committed on the hearing before a magistrate of an information for sporting without a game certificate.

R. V. Richards, for the prosecution, asked, that the witnesses on both sides might be ordered out of Court, which was accordingly done.

A witness named Hilliard was called on the part of the prosecution; but it was stated that he had been in Court during the whole of the trial.

F. V. Lee, for the defendant.—I hope that your Lordship, as this is a criminal case, will exercise your discretion, by rejecting the evidence of this witness.

PARK, J.—I will always, in a criminal case, reject a witness remaining in Court after all the witnesses on both sides have been ordered to leave it.

The witness was not examined (*a*).

To prove what the defendant swore before the magistrate, his deposition, taken in writing before the magistrate, was put in.

R. V. Richards, for the prosecution, proposed to call Mr. Flint to depose to other things stated by the defendant, when he was examined as a witness before the magistrate, but which were not contained in the written deposition.

(*a*) See the cases of *Everett v. 585*, and the authorities there
Lowdham, ante, Vol. 5, p. 91; cited.
Beamon v. Ellice, ante, Vol. 4, p.

PARK, J.—I am of opinion, that that cannot be done.

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Verdict—Not guilty.

REX

R. V. Richards, and Talbot, for the prosecution.

WYLD.

Godson, and F. V. Lee, for the defendant.

[Attornies—*A. Flint, and Barber.*]

SHROPSHIRE ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE PATTESON.

MARSTON *v.* DOWNES and Wife, Executrix of VAUGHAN. *March 21.*

ASSUMPSIT on a promissory note, made by the defendants' testator, and payable by instalments. Pleas—first, general issue; and, second, *plene administravit*.

Mrs. Downes was the executrix of Mr Vaughan, but her husband was not his executor; and it was opened on the part of the plaintiff, that Mr. Vaughan in his lifetime had executed a deed, by which Mr. Downes was empowered to raise money by mortgage of lands to pay the debts of Mr. Vaughan; and that a sum of 1400*l.* had been raised by Mr. Downes; and that certain debts having been paid by him, the executrix would have sufficient assets to pay the plaintiff.

In an action against a feme covert executrix and her husband *plene administravit* was pleaded. It appeared that the husband, who was not executor, paid debts to more than the amount of the assets; but it appearing, that, before he so paid them, he had raised a sum of 1400*l.* by mortgage of lands, under a power given to

him by a deed executed by the testator in his lifetime, for the purpose of paying the testator's debts, it was left to the jury to say whether he paid the debts out of the assets in the hands of his wife, or out of the sum so raised.

Equitable assets, when they come into the hands of the executor in money, are legal assets.

What a mortgagor, in treaty to raise money, says to the attorney of the mortgagee, is not a privileged communication.

In an action against a mortgagor, the attorney of the mortgagee, who has the mortgage deed, cannot be compelled to produce it, if he objects to do so; nor can he be compelled to give evidence of its contents; but he may be asked for what purpose the money was raised; and secondary evidence may be given of the contents of the mortgage deed.

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To prove this, Mr. Watson was called. He stated that Mr. Jones had acted as the attorney of Mr. Downes in a negotiation for the raising of money, and that he (Mr. Watson) had acted for the mortgagee, and that Mr. Downes had had a conversation with him.

Ludlow, Serjt., for the defendants, objected that this was a privileged communication.

PATTESON, J.—Were you attorney for Mr. Downes?

Mr. Watson.—No, my Lord.

PATTESON, J.—Then the communication is not privileged.

Mr. Watson gave evidence of the conversation, and stated that a mortgage deed was executed, and that it was in his possession as attorney for the mortgagee; and he, therefore, declined to produce it.

Talfourd, Serjt.—I must give secondary evidence of its contents.

Ludlow, Serjt.—I submit that that cannot be done.

PATTESON, J.—I hope we are not come to the time when, if a party cannot come at a deed, he may not get at the facts by other evidence. It would be a most dreadful denial of justice, and one man would be allowed to do injustice by availing himself of the privilege of another (a).

Mr. Watson stated that he was acquainted with the contents of the deed.

Ludlow, Serjt.—I must object to Mr. Watson being compelled to state the contents of the deed.

PATTESON, J.—I cannot compel Mr. Watson to state

(a) See the case of *Cocks v. Nash*, ante, p. 154.

the contents of his client's deed, because that would be just the same as making him produce it.

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Corbett, for the plaintiff, wished to ask Mr. Watson the purpose for which the money was raised.

PATTESON, J.—I think it is a little dangerous; but I will allow you to ask it.

The question was put, and Mr. Watson stated, that the money was raised by Mr. Downes to pay Mr. Vaughan's debts; and that Mr. Vaughan had, by a deed, executed shortly before his death, given Mr. Downes an authority to raise it. He also stated, that he (Mr. W.) had, on the 24th of December, 1832, paid Mr. Downes 1400*l.* for that purpose.

PATTESON, J.—If I am wrong in admitting this evidence, the defendant will have the benefit hereafter.

Ludlow, Serjt.—A sum of money raised by virtue of a power of mortgage is only equitable assets.

PATTESON, J.—I shall hold them legal assets as soon as the money is received.

Ludlow, Serjt.—Money raised under a power is only equitable assets. It might be said, if an executor received a present from a person who respected the credit of the deceased, that that would be assets; but that is not so. It is only the direct assets that the creditor can call for the administration of. I shall cover the whole of the assets, except a part of this sum of 1400*l.*, which is in the hands of Mr. Downes as a trustee.

PATTESON, J.—Is there any case where the money has been paid in which it was held not to be assets? I should think that equitable assets, when they come into the hands of the executor, are legal assets.

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Whateley, for the defendants.—Mr. Downes is a trustee; he is not executor, though his wife is executrix.

Talfourd, Serjt.—I do not put it, that this sum of 1400*l.* is strictly assets; but I say that Mr. Downes is to pay the debts as trustee. He, therefore, cannot charge upon the assets any sums paid by him, because, if he did his duty, he ought to have paid the debts from this fund.

PATTESON, J.—Mr. Downes is not executor; and I think, that, if my brother *Ludlow* discharges himself of the sum which is legal assets, you must go into equity.

On the part of the defendants, it was proved, that, after the payment of the sum of 1400*l.* by Mr. Watson to Mr. Downes, the latter paid debts of the deceased to an amount more than equal to the amount of the assets in the hands of the executrix.

PATTESON, J., left it to the jury to say, whether these payments were made by Mr. Downes out of the assets which came to the hands of the executrix, as executrix, or whether he made those payments out of the sum of 1400*l.* received from Mr. Watson.

Verdict for the plaintiff.

PATTESON, J.—I shall give leave to move to enter a nonsuit, if the Court of King's Bench should think that evidence has been improperly received; or to enter a verdict for the defendants, if the Court should think that the point which I have left to the jury ought not to have been left to them.

Talfourd, Serjt., and *Corbett*, for the plaintiff.

Ludlow, Serjt., and *Whateley*, for the defendants.

[Attornies—*Dansey*, and *Jones*.]

IN the ensuing term, *Ludlow*, Serjt., moved in pursuance of the leave given; but the Court of King's Bench refused a rule.

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CHARLTON, Esq., v. WATTON.

March 21st.

LIBEL. Plea—General issue. The libel, which was contained in the Shrewsbury Chronicle newspaper, purported to be a report of what had occurred at the Town Hall, at Ludlow, on the occasion of one of his Majesty's commissioners of inquiry going to Ludlow to inquire into the state of that corporation.

A libel purported to be a report of what occurred before one of his Majesty's commissioners of inquiry respecting corporations:—*Held*, that the defendant could not give evidence of the accuracy of the report as a matter of justification, but that he might give such evidence in mitigation of damages:—*Held*, also, that if he did so, the plaintiff might give evidence in reply, to shew the inaccuracy of the report.

At the conclusion of Mr. Serjt. *Talfourd's* opening—

PATTESON, J., said—That there may be no mistake, I think I ought to say now, that I am of opinion that the defendant cannot give in evidence in bar of this action that this is a true report of what occurred; but he may give such evidence in mitigation of damages.

Talfourd, Serjt.—If that is done, may I not be allowed to answer such evidence by evidence in reply?

PATTESON, J.—Certainly; because you cannot know at present that the other side will give any evidence to that effect.

Talfourd, Serjt.—We have evidence on this point.

Jervis, for the defendant.—We challenge the other side to disprove the accuracy of the report.

PATTESON, J.—I think the plaintiff is not bound to go into that in the first instance.

The town-clerk of Ludlow was cross-examined as to the correctness of the report, and, in consequence, no witnesses were called for the defendant.

Verdict for the plaintiff—Damages, 1s.

Talfourd, and *Bather*, for the plaintiff.

Jervis, and *Whateley*, for the defendant.

[Attornies—*Allan & Benbow*, and *Williams*.]

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HEREFORD ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE PATTESON.

 REX v. BONNER.

In order to render a declaration *in articulo mortis* admissible in a case of manslaughter, it is not necessary to prove expressions of the deceased that he was in apprehension of almost immediate death; but the Judge will consider from all the circumstances, whether the deceased had or had not any hope of recovery.

MANSLAUGHTER.—The facts proved were very barely sufficient to raise an inference that the prisoner, being the coachman to the mail coach between Hereford and Shrewsbury, had struck with his whip the horse drawing a light-covered cart, in which the deceased was proceeding at night, along the road between Leominster and Ludlow, unless the dying declarations of the deceased, John Beavan, made on Wednesday, the 14th of August, could be admitted in evidence, to prove the circumstances under which his cart was overturned, and himself severely injured—

Godson, for the prosecution, called a person who saw the deceased immediately after the accident, which happened about two o'clock in the morning of Sunday, the 11th of August, 1833; and he described the state in which the deceased was found after the accident, and the carrying of him to a house at Brimfield. The surgeon stated that he attended the deceased on Sunday, the 11th, when he found him with six ribs broken, and other injuries; that he informed the deceased that he could not expect to recover. That Beavan replied, that he was aware he must go out of the world unless he was relieved by medicine; that he was better on Monday, but passed a very bad night on Tuesday; and that on the Wednesday he was very ill, and said that he was satisfied that he must go out of the world. A clergyman, (Mr. Pinhorn), also stated, that the deceased told him on the Wednesday

that he did not expect to live. A brother, and a son-in-law of the deceased, also stated that they were sent for by the deceased, and saw him on the Wednesday, when he expressed his great anxiety to settle his worldly affairs, as he had not long to live. He died on the following Saturday.

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C. Phillips, and *Busby*, for the prisoner, submitted that the fact that the deceased did on the Sunday express himself in terms which clearly shewed that he hoped to recover, and the fact that he did live until the Saturday, made the dying declarations not receivable in evidence.

Godson, contra, submitted, that it was not necessary to prove expressions of the deceased that he had no hopes of a recovery, but that it was sufficient to admit the evidence from the attending circumstances. It would be collected that he had no hope; indeed, there was here every possible circumstance: first, expressions of the man himself, that he expected to go out of the world; secondly, the evidence of the surgeon of the dangerous state of the injury, the extent of which had been communicated to the deceased; thirdly, that he immediately and anxiously settled his secular affairs; and, fourthly, that he sent for and enjoyed spiritual comfort from a clergyman.

PATTESON, J.—I think that I am bound to admit the declarations of the deceased. It is quite clear that he did not expect to survive the accident; and it is evident that he thought on the Wednesday that he might die on that day. It is not necessary to prove expressions of apprehension of immediate danger; and the circumstance that he lived until Saturday did not alter the state of things on the Wednesday.

The dying declarations were admitted; but the guard

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was called by the coachman, and he proved that the cart must have been overturned by the deceased himself, who was drunk.

Verdict—Not guilty.

Godson, for the prosecution.

C. Phillips, and *Busby*, for the prisoner.

[Attornies—*Anderson & Downes*, and *Sill*.]

See the cases of *Rex v. Pike*, ante, Vol. 4, p. 233; *Rex v. Crockett*, ante, Vol. 3, p. 598; *Rex v. Van ett*, Id. p. 544, and *Rex v. Hayward*, ante, p. 157.

· REX v. ADDIS.

A servant of Mr. C. attempted to apprehend A., who was out at night poaching in a wood, and he was killed by A. Mr. C. was neither the owner nor the occupier of the wood, nor the lord of the manor, he having only the permission of the owner to preserve game there:—*Held*, that this was manslaughter only in A.

If an accomplice be confirmed only as to collateral facts, which do not connect either the accused with the offence, or the accused and the accomplice together, it is not sufficient.

MURDER.—The prisoner was charged with the wilful murder of James Davis, by shooting him.

The deceased was an assistant game-keeper of Edward Bolton Clive, Esq.; and it appeared, that, on the night of the 9th of January, 1834, a party of poachers were in a wood in the township of Treville in pursuit of game; and that the deceased and others pursued them, and tried to apprehend them; upon which one of the poachers turned round and shot the deceased. It further appeared, that the wood was neither the property, nor in the occupation of Mr. Clive, nor was it within any manor which belonged to Mr. Clive. Mr. Clive only having the permission of the owner to preserve game there.

Ludlow, Serjt., and *Godson*, for the prisoner, submitted, that, inasmuch as Mr. Clive's game-keeper had no authority to apprehend the poachers under the stat. 9 Geo. 4, c. 69, s. 2, the offence of the person who shot the deceased could only have amounted to manslaughter.

C. Phillips, and *Talbot*, for the prosecution, cited the case of *Rex v. Warner* (a).

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PATTESON, J.—I think the objection is well founded. The case of *Rex v. Warner* is, if any thing, an authority in favour of the prisoner.

The case then went on as a case of manslaughter.

An accomplice was called to prove that the prisoner was the person who shot the deceased; and other witnesses were called who corroborated him as to collateral facts; but none of those facts went to connect either the prisoner and the accomplice together, or the prisoner with the transaction.

PATTESON J.—The corroboration of an accomplice ought to be as to some fact or facts, the truth or falsehood of which go to prove or disprove the offence charged against the prisoner.

Verdict—Not guilty.

C. Phillips, and *Talbot*, for the prosecution.

Ludlow, Serjt., and *Godson*, for the prisoner.

[Attornies—*Bodenham*, and *Jackson*.]

(a) Ante, Vol. 5, p. 525.

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MONMOUTH ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE PARK.

March 28th.

REX v. JOHN WILLIAMS.

A. went to a shop, and asked a boy there to give him change for a half-crown; the boy gave him two shillings and six pennyworth of copper. The prisoner held out a half-crown, which the boy touched, but never got hold of, and the prisoner ran away with the 2s. and the copper:—*Held*, a larceny of the 2s. and the copper.

LARCENY.—The prisoner was indicted for stealing a half-crown, two shillings, and six penny pieces.

It appeared that the prisoner went to the shop of the prosecutor, and asked the prosecutor's son, who was a boy, to give him change for a half-crown. The boy gave him two shillings and six penny pieces, and the prisoner held out a half-crown, of which the boy caught hold by the edge, but never got it. The prisoner then ran away.

Talbot, for the prosecution, cited the case of *Rex v. Oliver (a)*.

PARK, J., (in summing up).—If the prisoner had only been charged with stealing the half-crown, I should have had great doubt, but he is indicted for stealing the two shillings and the copper. He pretends that he wants change for a half-crown, gets the change, and runs off; I think that is a larceny.

Verdict—Guilty.

Talbot, for the prosecution.

[Attorney—Gabb.]

(a) 2 Leach, 1072, cited Jerv. Arch. 183.

1834.

REX v. WILLIAM JONES.

March 28th.

THE prisoner was indicted for stealing a watch, the property of Philip Richards; and the indictment charged that the prisoner had been previously convicted of a larceny at the Carmarthen Sessions.

Practice.—The Judges have held, that, if a prisoner is indicted for a felony after a previous conviction, the proof of the previous conviction is to be given before the prisoner is called on for his defence.

PARK, J., (in summing up).—I used never to allow the jury to know any thing of the previous conviction till they had given their opinion on the charge upon which the prisoner was to be tried; because I thought, that, if the jury were aware of the previous conviction, it was (to use a common expression) like trying a man with a rope about his neck. However, the Judges have had a meeting on the subject, at which thirteen of them were present, and they held that my practice and that of another learned Judge was wrong; and the opinion of the Judges is, that the previous conviction must be proved before the prisoner is called on for his defence.

Verdict—Guilty.

Justice, for the prosecution.

[Attorney—*New.*]

GLOUCESTER ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE PARK.

—♦—
BATEMAN v. BURGE.

March 31st.

CASE for obstructing a footway. Plea—General issue.

It appeared that the plaintiff and defendant were the owners of adjoining lands; and it appeared that the way

If there be a public footway with a stile across it of a certain height, no one has a

right to remove the stile and put up a gate of greater height; and the fact, that gates had been previously placed across other parts of the way will be no defence.

If there be an obstruction of a public way, and any person receives a special injury from it, he may maintain an action.

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had always been a public footway, with a stone stile, two feet high, across it; but that the defendant had removed the stile, and put up a high five-bar gate, with a step upon it.

PARK, J.—If there was no gate there before, the defendant has no right to put up a high five-bar gate to give people the trouble of getting over it.

Ludlow, Serjt., for the defendant.—If this is a public way, no action will lie. The remedy is by indictment. If a gate were erected on the road between Gloucester and Cheltenham, every person living between Gloucester and Cheltenham could not bring an action.

PARK, J.—If there be a public nuisance, and any one person receives a special injury from it, that person may bring an action.

Ludlow, Serjt.—I am in a condition to prove that there were gates before, across other parts of the way.

PARK, J.—If there were twenty gates in other places before, that will not justify you in putting up this gate.

The case was referred.

Talfourd, and *Justice*, for the plaintiff.

Ludlow, Serjt., and *R. V. Richards*, for the defendant.

[Attornies—*Young & Son*, and *White & W.*]

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(*Crown Side.*)

BEFORE MR. JUSTICE PATTESON.

REX v. WILLIAM LLOYD and GEORGE LLOYD.

April 1st.

THE prisoner, William Lloyd, was indicted for stealing bank notes and money in the dwelling-house of Frances Gurner; and the prisoner George Lloyd was charged with receiving the stolen property, knowing it to have been stolen.

It appeared that the prisoner, George Lloyd, and his wife, were both in custody on this charge, but in separate rooms. A person, who was in the room where the former was in custody, said—"I hope you will tell, because Mrs. Gurner can ill afford to lose the money;" and that the constable said—"If you will tell where the property is, you shall see your wife."

A. and his wife were separately in custody on a charge of receiving stolen property. A person, who was in the room with A., said—"I hope you will tell, because Mrs. G. can ill afford to lose the money;" and the constable then said—"If you will tell where the property is, you shall see your wife:"—*Held*, that a statement made by A. afterwards was admissible in evidence.

Greaves, for the prisoner, objected to evidence being given of any thing that was said after this; and cited the case of *Rex v. Thomas (a)*.

PATTESON, J.—I think that this is not such an inducement to confess as will exclude the evidence of what the prisoner said. It amounts only to this, that, if he would tell where the money was, he should see his wife.

The evidence was received.

The prisoner, William Lloyd, was convicted;
and the prisoner, George Lloyd, acquitted.

Greaves, for the prosecution.

C. Watson, for the prisoner.

[Attornies—*Newman and Abell.*]

(a) Ante, p. 353.

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April 3rd.

REX v. GILES COATES.

A. had the barrels of a double-barrelled percussion gun detached from the stock and lock: by striking the percussion cap, which was on the nipple of one of the barrels, he fired it and shot B.:—*Held* to be within the stat. 9 Geo. 4, c. 31, ss. 11 and 12.

SHOOTING.—The prisoner was indicted on the stat. 9 Geo. 4, c. 31, ss. 11 and 12 (*a*), for shooting at George Simper, with intent to murder him; there were, also, counts charging the intent to be to disable, do grievous bodily harm, &c.

It appeared that the prosecutor was a game-keeper of Lord Stowell; and that he was, on the night of the 20th of October, 1833, in a wood belonging to his Lordship, called "Weakley Wood;" and that he was induced to go there by hearing shots fired in that wood. The prosecutor stated that he there saw the prisoner, who, on perceiving him, ran away, but that the prisoner fell; and, as he was down, he (the prosecutor) took the stock and lock of a double barrel percussion gun from the prisoner's pocket. The prisoner then got up, and taking the barrels of the gun from another of his pockets, he struck the percussion cap, which was on the nipple of one of the gun-barrels, with something that he took from his waistcoat pocket, which the prosecutor supposed to be a knife, and by these means one of the barrels was fired, and the prosecutor shot.

Greaves, for the prisoner.—There is a most important question to be determined in this case, which is, whether the gun-barrel is such a weapon as is within this act of Parliament; the words are, "if any person shall unlawfully and maliciously shoot at any person, or shall, by drawing a trigger, or in any other manner attempt to discharge any kind of *loaded arms* at any person;" and this enactment was substituted for an enactment contained in Lord *Ellenborough's* Act, (43 Geo. 3, c. 56), which contained the words "*loaded fire-arms*," instead of the words

(*a*) These sections of the stat. are set out in Carr. Supp. p. 236-7.

“loaded arms;” however, both statutes evidently contemplate that the offence must be committed with a perfect weapon, and not with a part of a weapon. I submit, therefore, that this not being a perfect weapon, the present case is not within the statute.

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PATTESON, J.—The material words, with respect to this case, are “shall shoot at.”

Greaves.—But they are coupled with the words respecting the attempting to discharge loaded arms, which evidently shews that the legislature meant, in the one case, to provide for the attempt to discharge loaded arms, and, in the other, to provide for the actual discharge of the loaded arms.

PATTESON, J.—My present impression is, that this is a case within the statute upon which the prisoner is indicted; but I will consider the point; and if I should, on further consideration, think it necessary, I will reserve the point for the opinion of the Judges (a).

Verdict—Guilty.

Talbot, for the prosecution.

Greaves, for the prisoner.

[Attornies—*Stevens*, and *Abell & Clutterbuck*.]

(a) His Lordship afterwards conferred with several of the other learned Judges, and finding that their opinions entirely coincided

with his own, did not reserve the point for the opinion of the fifteen Judges.

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REX v. WILLIAM MASTIN and JOHN MASTIN.

If A. and B. be riding fast along a highway (as if racing), and A. ride by without doing any mischief, but B. rides against the horse of C., whereby C. is thrown and killed, this is not manslaughter in A.

MANSLAUGHTER.—The first count of the indictment charged that the prisoner, William Mastin, rode against the horse of John Secker, the deceased, whereby he was thrown to the ground and killed; and it then went on to charge John Mastin as a principal in the second degree. There was also a count, charging that the prisoners were racing on the highway, and that the horse of the deceased thereby became frightened, and threw him.

It appeared, that, on the evening of the 14th of September, the prisoners, who were brothers, were on horseback, and were riding at a very rapid pace along a rather unfrequented highway, leading from Burford to Widford, and that the deceased was also on horseback. It further appeared, that the deceased drew off his as far from the middle of the road as the situation of the place would allow; and that John Mastin passed by him without any accident, but that the horse of William Mastin and the horse of the deceased came into collision, when both the deceased and William Mastin were thrown, and the deceased killed.

Justice, for the prisoner, John Mastin.—I submit that the evidence does not affect my client at all. Two persons were riding, and at a rapid rate, and one goes by and does no mischief; he certainly cannot be guilty of manslaughter, because another, who comes up a little afterwards, kills a person. The aiding which is charged in this indictment is the aiding in some act which caused the death of the deceased.

Curwood, for the prosecution.—As both the prisoners were racing, the act of one is the act of both.

PATTESON, J.—I think that if two are riding fast, and

one of them goes by without doing any injury to any one, he is not answerable, because the other, riding equally fast, rides against some one and kills him.

His Lordship directed the acquittal of John Mastin.

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For the prisoner William Mastin, several witnesses were called to prove that the horse ridden by Mr. Secker was a restive horse, and to induce an inference that his horse swerved across the road, and that that caused the accident.

PATTESON, J., (in summing up).—If you think that the prisoner, William Mastin, was riding in an improper and furious way, and rode against the deceased, he is guilty of manslaughter; but, if you think that Mr. Secker's horse was unruly and got into the way, you ought to acquit.

Verdict—Not guilty.

Curwood, and *Carrington*, for the prosecution.

Ludlow, Serjt., for the prisoner William Mastin.

Justice, for the prisoner John Mastin.

[Attornies—*Westell & Son*, and ———.]

—◆—
 REX v. WINK.

April 5th.

ROBBERY.—The prisoner was indicted for robbing Thomas Birchell.

The prosecutor stated that he was going home along a road, at Bitton, about twelve o'clock on the night of the 1st of July, when he was attacked and robbed by the prisoner and three other persons. He also stated, that, at

If a party robbed go with-
 in a few hours
 after the rob-
 bery to a con-
 stable, and men-
 tion the name
 of the person
 who robbed
 him, the party
 robbed may be
 asked at the

trial whether he named any person to the constable; but ought not to be asked what name he mentioned; and the constable may be asked, whether, in consequence of the party robbed mentioning a name to him, he went in search of any person, and, if so, who that person was.

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between five and six o'clock on the next morning, he went to a constable named Haskins, and complained to him of the robbery. He further stated, that he then mentioned the name of a person, as the name of one of the persons who had robbed him.

Carrington, for the prosecution.—Does your Lordship think that I ought to ask him what name he mentioned?

PATTESON, J.—No, I think you ought not; but when you examine the constable, you may ask him, whether, in consequence of the prosecutor mentioning a name to him, he went in search of any person, and, if he did, who that person was?

Verdict—Guilty.

Carrington, for the prosecution.

C. Watson, for the prisoner.

[Attornies—*Latham*, and ———.]

REX v. DOWSELL and BRIDGWATER.

To support an indictment for night poaching, by three or more being armed, &c., it is not sufficient to prove that one of the prisoners was in the place laid in the indictment, and that the rest of the party were in another wood, which was separated from the place mentioned by a turnpike road.

THE prisoners were indicted on the stat. 9 Geo. 4, c. 69, s. 9, for night poaching, being armed, &c. The indictment contained four counts, three of which alleged the offence to have been committed in Rodborough Hill Brake; and the fourth, in certain inclosed land of Sir Berkeley William Guise, Bart., in the occupation of Samuel Merrett. It appeared in evidence, that Dowsell alone was seen in Rodborough Hill Brake, between which and a wood, called Rodborough Wood, a public turnpike road ran; and that at that time no one was in company with Dowsell; that he then escaped out of the brake into the road, where he was seized by a keeper, and whistled loudly, upon which four more men, one of whom was

Bridgwater, came out of Rodborough Wood, and rescued **Dowsell**. Shots had been heard in the direction of the brake and the wood previously, but the witnesses were unable to speak as to which place the shots were fired in. Rodborough Wood was not in the occupation of Merrett.

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Greaves, for the prisoners.—There is no evidence to go to the jury. The last count is not proved so as to apply to the wood; and there is no evidence whatever of any one except **Dowsell** having been in the brake, still less of three being there *together*.

PATTESON, J.—They must be all proved to be in the place laid in the indictment; that is not shewn here: therefore the prisoners must be acquitted.

Verdict—Not guilty.

Justice, for the prosecution.

Greaves, for the prisoners.

[Attornies—*Jenkins*, and *John Hulls*.]

—◆—
 REX v. DENSLEY, STONE, and two Others.

THE prisoners were indicted for receiving stolen property, knowing it to have been stolen.

The evidence was, that the property having been discovered, after the loss, concealed in an old engine-house, several persons kept watch, and **Stone** came alone in the night and took the property out of the engine-house; on which he was immediately seized, and dropped the bag in which the property was amongst some standing corn;

Stolen property being found concealed in an old engine-house, and, it being watched, the prisoners were seen taking it away:—*Held*, that, to warrant the conviction of the prisoners, on an indictment charging them

as receivers, the jury must be satisfied that the property had been stolen by some other person to the knowledge of the prisoners, and that there should be some evidence to shew that such was the case:—*Held*, also, that the evidence given in this case would warrant a conviction for the stealing.

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shortly afterwards the other prisoners came up and carried the bag away.

PATTESON, J., (in summing up).—You must be satisfied that all the prisoners knew that there was stolen property in the engine-house, and that they took it away with one common design; and you must be satisfied that Stone and the other prisoners went together with the intention of removing the property, and that, finding Stone in custody, in pursuance of such intention they took it away. But, if you do believe that, then another difficulty arises; for, if you believe that they all went together, then the question will arise whether all were not the stealers? There is no evidence that any other person stole the property; if there had been evidence that some one person had been seen near the house from which the property was taken, or there had been strong suspicions that some one person stole it, then those circumstances would have been evidence that the prisoners received it knowing it to have been stolen. But, if you are of opinion that some other person stole it, and that the prisoners knew of that fact, and planned together in order to get the property away, they may be convicted of receiving. I confess it appears to me on this evidence rather dangerous to convict them for receiving. It is evidence on which persons are constantly convicted of stealing. The question is, whether you are satisfied that they were the stealers or the receivers?

The jury found them all guilty of stealing; whereon a verdict of not guilty was entered (a).

Justice, and *Greaves*, for the prosecution.

Alexander, for the prisoners.

[Attornies—*Latcham*, and ———.]

(a) The grand jury had, on the same evidence, ignored a bill against the same prisoners as principals for burglary, and stealing the same goods.

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REX v. HESTER EDWARDS.

MURDER.—This indictment charged that the offence had been committed by cutting the throat of the deceased.

The surgeon proved that the jugular vein was divided, but not the carotid artery; and, on cross-examination, he stated that what he called the throat was not cut, the wound not having extended so far round the neck.

C. Phillips, and *Watson*, for the prisoner, submitted that the indictment was not proved. The throat ought to have been shewn to have been cut.

PATTESON, J.—The question is, whether the term “throat” in the indictment is to be confined to that part of the neck which is scientifically called the throat, or whether it means that which is commonly called the throat; I am clearly of opinion it means the latter, and I do not entertain the slightest doubt about it.

Murder.—The indictment charged that the offence had been committed by cutting the throat of the deceased:—*Held*, that the “throat” means what is commonly so called, and that this allegation was proved by shewing that the jugular vein was divided, although the carotid artery was not cut, and although the surgeon stated that what he should call the throat was not cut.

The prisoner was acquitted on the merits.

Justice, and *Greaves*, for the prosecution.

C. Phillips, and *C. Watson*, for the prisoner.

[Attornies—*Visard*, *Buchanan*, & *Moore*, and *Croad*.]

See the case of *Rex v. Cullin*, ante, Vol. 5, p. 121.

NORFOLK SPRING CIRCUIT, 1834.

BEDFORD ASSIZES.

BEFORE MR. BARON VAUGHAN.

1834.

March 10th.

REX v. PARROT.

A cart hovel, consisting of a stubble roof, supported by uprights, in a field at a distance from other buildings, is not an outhouse within the meaning of the stat. 7 & 8 Geo. 4, c. 30, s. 2.

THE prisoner was indicted under the stat. 7 & 8 Geo. 4, c. 30, s. 2, for setting fire to a place described in the indictment as an outhouse.

It turned out upon the evidence that the building was a kind of cart hovel, consisting of a stubble roof, supported by uprights, and was situate by itself in a field, some distance from any other buildings.

Smith, for the prisoner, submitted that it was improperly described as an outhouse.

VAUGHAN, B.—Was of that opinion; but said that he would not stop the case upon the point, but would, if it became necessary, reserve it for the opinion of the Judges.

The prisoner was acquitted upon the facts.

Andrews, for the prosecution.

Smith, for the prisoner.

[Attornies—Hooper, and Rogers.]

See the case of *Rex v. Haughton*, ante, Vol. 4, p. 555, and the cases there cited. See also *Rex v. Winter*, R. & R. 295, and *North's case*, 2 East, P. C. 1021.

1834.

CAMBRIDGE ASSIZES.

BEFORE MR. BARON VAUGHAN.

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 REX v. COE.

March 14th.

THE prisoner was indicted under the statute 9 Geo. 4, c. 31, s. 13 (a), for administering saffron to the prosecutrix, with intent to procure abortion.

Pryme, for the prisoner, was cross-examining as to the prosecutrix's having taken something else before the saffron, and also as to the innoxious nature of that article.

VAUGHAN, B.—Does that signify? It is with the intention that the jury have to do; and, if the prisoner administered a bit of bread merely with intent to procure abortion, it is sufficient to constitute the offence contemplated by the act of Parliament (b).

Semble, that, so far as the nature of the thing administered is concerned, the question on an indictment under the stat. 9 Geo. 4, c. 31, s. 13, is a question of the intention of the party administering it, and not of the noxious or innoxious character of the article itself.

Verdict—Guilty.

Praed, for the prosecution.*Pryme*, for the prisoner.

(a) In that part of the clause which relates to women quick with child, the words used are, "any poison or other noxious thing," and "any instrument or other means whatever." In that part of the clause which relates to women not quick, instead of the words, "poison or other noxious thing," the words used are "any medicine or other thing."

(b) The poison or noxious thing must be actually taken by, or applied to, the woman, (*Rex v.*

Cadman, 1 R. & M. C. C. R. 114), and administered with the intent to procure miscarriage. Whether it would, in fact, produce that effect, seems to be immaterial; but whether it should appear that the drug administered was a 'poison' or 'noxious thing,' or whether the words, 'other means whatever,' render this unnecessary, seems doubtful. See Arch. Cr. Law, 336, 4th edit.; 1 Chit. Burn, 10. The above decision seems to decide the doubtful question. How-

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ever, see the case of *Res v. Scudder*, ante, Vol. 3, p. 605, which decides, that, unless the woman be with child, the offence is not committed, whatever the intent may have been. That case overrules, in part, a decision of Mr. Justice *Lawrence*, in *Res v. Phillips*, 3 Camp. 76; but that learned Judge

said also, (and this part does not appear to have been questioned), "that it was immaterial whether the shrub was savine or not, or whether it was *capable of procuring abortion*, if the prisoner believed at the time that it would procure it, and administered it with that intent."

SUFFOLK ASSIZES—BURY ST. EDMUNDS.

BEFORE LORD CHIEF JUSTICE DENMAN.

—◆—
REX v. HOWES.

March 19th.

Where a prisoner, who made a confession to a constable, in consequence of a promise held out, was taken before a magistrate, who, knowing what had taken place, cautioned the prisoner against making any confession before him; but the prisoner, notwithstanding, did make a confession to the magistrate:—

Held, that this second confession was receivable in evidence on the trial of the prisoner, though it did not appear that the magistrate told the prisoner that his first confession would have no effect, and he therefore might have acted under an impression, that, having once acknowledged his guilt, it was too late to retract.

THE magistrate who committed the prisoner for trial was called on the part of the prosecutor to prove a confession which had been made before him.

Prendergast, for the prisoner, on cross-examination, got out that the prisoner said in the presence of the magistrate and of two constables who had apprehended him, but who were not bound over to give evidence, that he had confessed to them, in consequence of their having told him that two others had split, and he might as well; and that, if he told all, he would be acquitted. The magistrate, however, stated that he told the prisoner that he need not say any thing before him unless he pleased. In answer to questions from the Lord Chief Justice, he said that the constables did not deny the truth of the prisoner's statement; but that he, the magistrate, told him that his confession would do him no good, but that he would be committed to prison to take his trial.

Prendergast.—The magistrate does not seem to have gone to the full extent of telling the prisoner that his former confession would have no effect. Constables are active agents in prosecutions; and the law will presume that the confession before the magistrate was a continuation of the former confession extorted by the constables. The statement of the constables acting upon his mind, he would naturally imagine that it was then too late to retract.

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DENMAN, C. J.—You do not refer me to any decision.

Prendergast.—In Archbold's Criminal Law it is laid down, that a statement, made after a confession obtained by undue means, is not receivable, if it resulted from the same influence.

DENMAN, C. J.—Yes; but I cannot say that this statement did result from the same influence as the first.

Prendergast also referred to Russel on Crimes and Misdemeanors, Vol. ii. p. 648; and *Rex v. Sarah Nute*, there cited (a).

DENMAN, C. J.—I do not think these cases carry it any farther. I think I must receive the confession (b).

The confession was read; but the prisoner was acquitted.

Prendergast, for the prisoner.

(a) See also the other cases collected in 2 Russ. Cr. & Misd. from p. 644 to 652. At page 648 it is laid down, that, "if a confession has been obtained from the prisoner by undue means, any statement afterwards made by him, under the influence of that confession, cannot be admitted as evi-

dence;" and reference is made to 2 East, P. C. c. 16, s. 94, p. 658, and *Rex v. White*, 1 Phil. Ev. 104.

(b) According to the case of *Rex v. Lingate*, 1 Phil. Ev. 115, "where a prisoner was told by one who came to assist the constable, that it would be better for him to confess; but, on being examined

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the following day, the magistrate frequently cautioned him to say nothing against himself; yet he confessed before the magistrate; it was held clearly admissible." See also *Rex v. Hardwick*, Id.; *Rex v. Richards*, ante, Vol. 5, p. 318; and *Rex v. Cooper*, Id. 535.

March 22nd.

Ex parte SUSAN ROLPH, a Prisoner for Debt.

Practice.—The service of the notices required to be given by a creditor who seeks to bring up a debtor under the compulsory clause in the Lords' Act, 32 Geo. 2, c. 28, s. 16, may be proved by a witness *videlicet* voce, and need not be proved by affidavit. *Secus*, with respect to the notices to be given by the prisoner.

SMITH moved on behalf of the detaining creditor to bring up the prisoner under the compulsory clause of the Lords' Act, 32 Geo. 2, c. 28, s. 16 (a), and called the clerk to the attorney as a witness, to prove the required notices.

Prendergast, for the prisoner, contended that the notices should be proved by affidavit.

DENMAN, C. J., inquired if there were any directions on the subject in the act of Parliament?

He was answered, that no mention was made of affidavits at all in that section of the act.

Prendergast submitted, that although the act said nothing about affidavits, yet the practice had always been to prove the notices by affidavit, and urged his Lordship to act upon the practice.

DENMAN, C. J.—Not in preference to the act of Parliament; I shall follow the act (b).

(a) By this section, a creditor causing a prisoner to be brought up must give twenty days' notice in writing, both to the prisoner and the other creditors, or their attorneys.

(b) Section 17 says, that a prisoner brought up by a creditor

into Court shall, "on proof there first made of such notices as before directed" having been given, deliver an account of his estate, &c. This, it will be perceived, makes no mention of the mode of proving the notices; but, in the 13th section, which relates to the

The prisoner refused to render her account, and was remanded.

Smith, for the creditor.

Prendergast, for the prisoner.

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application of the prisoner by petition to the Court, it is provided that an affidavit of the due service of the notices to be given by him must be delivered with the petition, and read in Court. It is

therefore but reasonable to conclude, that, if the legislature had intended to require proof by affidavit in both cases, it would have mentioned it in the one case as well as in the other.

NORWICH ASSIZES.

BEFORE MR. BARON VAUGHAN.

REX v. ELIZABETH TURNER.

March 25th.

THE prisoner was indicted for stealing in the dwelling-house of James Woodrow.

The place where the felony was committed was a bed-room over a stable, between which and the prosecutor's house there was not any direct communication. There was a wash-house under the same roof as the house, though there was no internal communication from the one to the other; but the stable was a separate building, neither under the same roof, nor communicating with it by means of any other building.

Stealing in a bed-room over a stable, in a yard not under the same roof, nor having any direct communication with the house in which the prosecutor resides, cannot be properly charged as a stealing in his dwelling-house.

VAUGHAN, B., told the jury that the indictment failed, so far as the stealing in the dwelling-house was concerned (a).

(a) See *Rex v. Burrows*, 1 Mood. C. C. R. 274; *Rex v. Westwood*, Russ. & Ry. C. C. R. 495.

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NORWICH CITY ASSIZES.

BEFORE MR. SERJT. STORKS.

(Who sat for Lord Chief Justice Denman.)

March 27th.

REX v. ———.

A. was indicted for stealing the property of Richard P. It appeared that the prosecutor's name was Richard Jeremiah P., but that he was generally known by the name of Richard P.:—*Held*, sufficient.

THE prisoner was indicted for stealing a whip, the property of Richard Pratt.

It appeared that the prosecutor's proper name was Richard *Jeremiah* Pratt, but he was generally known by the name of Richard Pratt.

Mr. Serjt. STORKS consulted with the learned Judges, and then decided that the indictment was sufficiently sustained by the evidence, and the prisoner was—

Convicted.

See *Rex v. Berriman*, ante, Vol. 5, p. 601.

OLD BAILEY MAY SESSION, 1834.

BEFORE MR. JUSTICE LITLEDALE, MR. JUSTICE VAUGHAN,
AND MR. BARON BOLLAND.

May 16th.

REX v. ARSCOTT.

It is not any offence under the stat. 1 Will. 4, c. 66, to forge an indorsement upon a warrant or order for the payment of money. Nor,

if a party write on the back of a bill of exchange, "Received for R. A.," and sign his own name to it, is he guilty of forging a receipt within the provisions of that statute.

If a person presents a bill of exchange for payment with a forged indorsement upon it of a receipt by the payee, and the clerk to whom he presents it objects to a variance between the spelling of the payee's name in the bill and the indorsement, upon which the person alters the indorsement into a receipt by himself for the drawer. *Semble*, that the act of presenting the bill to the clerk, previous to his objection, is sufficient to constitute the offence of uttering the forged indorsement.

THE prisoner was indicted under the stat. 1 Will. 4, c. 66, for forging and uttering, knowing it to be forged, an indorsement on an instrument, which was in the form of a bill of exchange, in which one Aickman was the payee.

The indorsement was—"Received, R. Aikman."

It appeared that the prisoner took the instrument in question to the banking-house where it was payable, and presented it for payment; but the clerk perceiving that the name of the payee in the instrument was spelt Aickman with a c, but in the indorsement was spelt Aikman, without any c, objected to pay it; upon which the prisoner altered the indorsement so as to make it stand thus—"Received for R. Aickman, G. Arscott."

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Adolphus, for the prisoner, submitted that this did not constitute an uttering of the original indorsement, as the whole that took place, viz., the presentment of the bill, the objection of the clerk, and the alteration by the prisoner, formed but one transaction.

VAUGHAN, J.—It is brought to him with the indorsement upon it, and he utters it.

LITLEDALE, J.—The question is, whether he uttered the indorsement with intent to obtain the money?

VAUGHAN, J.—I have no doubt about it in my own mind.

BOLLAND, J., (who during the argument had been looking over the various counts of the indictment), said—The offences charged in the indictment are, the forging an *indorsement* on an order for the payment of money, and also the uttering of the indorsement, and the forging and uttering a *receipt* on an order for the payment of money. On looking at the act of Parliament, the sections which apply to this case appear to be the third and the tenth. By the third section, several substantive acts of forgery are mentioned. [His Lordship read the section through.] Now, if this had been charged as a bill of ex-

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change, instead of an order for the payment of money, there would not have been any difficulty. But the section does not include, in the offences enumerated, the forging of an indorsement on an order for the payment of money. The tenth section applies to the forging and uttering of receipts. But the words used are, "any acquittance or receipt, either for money or goods, or any accountable receipt, either for money or goods, or for any note, bill, or other security for payment of money." That section, therefore, will not apply to those counts which charge the prisoner with forging and uttering a receipt on an order for the payment of money.

LITTLEDALE, J.—There are three sets of offences charged in the indictment; the first relates to an order, the second to a warrant, and the third to a receipt. It is not necessary to consider the first question that was raised, whether the prisoner *uttered* the forged indorsement upon the instrument or not, as those counts of the indictment which charge that offence are not properly framed, as they do not properly describe the instrument. The act of Parliament which consolidates the acts relating to forgery says: [His Lordship here read section 3, and observed:]—Therefore it is made a felony if any person forges or puts off any bill of exchange, or any promissory note for the payment of money, or any indorsement on either of them. If the charge had been the uttering a forged indorsement upon a bill of exchange, it would have met the facts of this case; but that is not the offence charged in this indictment. Let us then see what the act of Parliament provides with respect to warrants and orders. The legislature has made no provision for forging an indorsement on any warrant or order, but for forging the instrument itself; and I think the act of Parliament was purposely so framed, because warrants and orders do not pass by indorsement, but bills of exchange and promissory

notes do. It is very probable that the person, who drew the indictment, not seeing in the instrument so many days or months after date, did not think it was a bill of exchange, and therefore charged the prisoner with uttering a forged indorsement on an order for the payment of money. Now, this is not an offence within the act of Parliament; and I think you cannot call the indorsement itself an order for the payment of money, because the word "indorsement" is used in the act, and the act meant a distinct instrument in mentioning a warrant or order. Then, as to the tenth section, the question is, whether this is forging a receipt for the payment of money? The words are—"Received for R. Aickman, G. Arscott." I take it, that, to forge a receipt for money, is writing the name of the person for whom it is received. But, in this case, the acts done by the prisoner were, receiving for another person, and signing his own name. Under these circumstances the prisoner must be acquitted upon this indictment.

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VAUGHAN, J.—I am of the same opinion. And I think it is much better that the most guilty offender should escape, than that the law should be strained to meet any particular case.

Bodkin, and *F. V. Lee*, for the prosecution.

Adolphus, for the prisoner.

See the case of *Rex v. Horwell*, ante, p. 148.

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—PROMOTIONS.
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IN the Vacation after Trinity Term, 1833, *J. Balguy*, Esq., was appointed one of His Majesty's Counsel, learned in the law.

In the same Vacation, the Hon. *C. E. Law*, was appointed Recorder of London, *vice N. Knowlys*, Esq.; and *John Mirehouse*, Esq., was appointed Common Serjeant, *vice* the Hon. *C. E. Law*.

In the Vacation after Hilary Term, 1834, Sir *J. Campbell*, Knt., was appointed Attorney-General, *vice* Sir *W. Horne*; and *C. C. Pepys*, Esq., was appointed Solicitor-General, *vice* Sir *J. Campbell*, Knt.

In the same Vacation, *John Williams*, Esq., was appointed a Baron of the Exchequer, *vice* Sir *John Bayley*, Knt.

In the same Vacation, Sir *Thomas Denman*, Knt., Lord Chief Justice, was promoted to the Peerage, by the title of Baron *Denman*, of *Dovedale* in the county of *Derby*.

In the same Vacation, Mr. Serjeant *Jones*, by His Majesty's royal licence, assumed the name of *Atcherley*.

In Easter Term, 1834, Mr. Justice *J. Parke* was appointed a Baron of the Exchequer, *vice* Mr. Baron *Vaughan*; and, in the same Term, Mr. Baron *Vaughan* was appointed a Judge of the Court of Common Pleas, *vice* Mr. Justice *Alderson*; and, in the same Term, Mr. Justice *Alderson* was appointed a Baron of the Exchequer, *vice* Mr. Baron

Williams; and, in the same Term, Mr. Baron *Williams* was appointed one of the Judges of the Court of King's Bench.

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In Easter Term, 1834, his Majesty was pleased to issue the following warrant:—

“ WILLIAM, R.

“ WHEREAS it hath been represented to us, that it would tend to the general dispatch of the business now pending in our several Courts of Common Law, at Westminster, if the right of counsel to practise, plead, and to be heard, extended equally to all the said Courts; but such object cannot be effected so long as the Serjeants at Law have the exclusive privilege of practising, pleading, and audience during term time in our Court of Common Pleas, at Westminster: We do, therefore, hereby order and direct, that the right of practising, pleading, and audience, in our said Court of Common Pleas, during term time, shall, upon and from the first day of Trinity Term now next ensuing, cease to be exercised exclusively by the Serjeants at Law; and that upon and from that day, Our Counsel learned in the law, and all other Barristers at Law, shall and may, according to their respective rank and seniority, have and exercise equal right and privilege of practising, pleading, and audience, in the said Court of Common Pleas, at Westminster, with the Serjeants at Law. And we do hereby will and require you to signify to Sir *Nicholas Conyngham Tindal*, knight, Our Chief Justice, and his companions, Justices of Our said Court of Common Pleas, this Our Royal will and pleasure, requiring them to make proper Rules and Orders of the said Court, and to do whatever may be necessary to carry this Our purpose into effect. And whereas, We are graciously pleased, as a mark of Our Royal favour, to confer upon the Serjeants at Law, hereinafter named, being Serjeants at this present time in actual practice in

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our said Court of Common Pleas, some permanent rank and place in all our Courts of Law and Equity: We do hereby further order and direct, that *Vitruvius Lawes, Thomas D'Oyley, Thomas Peake, William St. Julien Arabin, John Adams, Thomas Andrews, Henry Storks, Ebenexer Ludlow, John Scriven, Henry John Stephen, Charles Carpenter Bompas, Edward Goulburn, George Heath, John Taylor Coleridge, and Thomas Noon Talfourd*, Serjeants at Law, shall from henceforth, according to their respective seniority amongst themselves, have rank, place, and audience, in all our Courts of Law and Equity, next after *John Balguy*, Esquire, one of our Counsel, learned in the law. And we do hereby will and require you not only to cause this Our Direction to be observed in Our Court of Chancery, but also to signify to the Judges of Our several other Courts at Westminster, that it is Our express pleasure that the same course be observed in all Our said Courts.

“Given at Our Court of St. James’s, this twenty-fourth day of April, in the fourth year of Our Reign.

“To the Right Honourable HENRY Lord BROUGHAM
AND VAUX, Lord Chancellor of Great Britain.”

COURT OF COMMON PLEAS.

Adjourned Sittings in London after Hilary Term, 1834.

BEFORE LORD CHIEF JUSTICE TINDAL.

1834.

JONES v. THOMPSON.

ACTION for criminal conversation with the plaintiff's wife.

The adultery was committed on board a ship, of which the defendant was captain, and in which the plaintiff's wife was a passenger.

It appeared from the evidence of a witness for the plaintiff, that, while on the voyage, the plaintiff's wife kept a journal.

Wilde, Serjt., proposed to ask the witness whether the plaintiff's wife had stated for what purpose she kept this journal.

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In an action for criminal conversation, where the adultery was committed on board a ship during a voyage, a witness may be asked, on the part of the plaintiff, whether the wife did not keep a journal, and whether she stated for what purpose she kept it.

Taddy, Serjt., for the defendant, objected to the question.

Wilde, Serjt.—My object is, to shew that she kept this journal to shew to her husband. It goes to shew her mode of thinking and speaking of her husband.

TINDAL, C. J.—I think it may be asked.

The question was put.

Verdict for the plaintiff.

Wilde, and *Jones*, Serjts., and *Robinson*, for the plaintiff.

Taddy, and *Andrews*, Serjts., for the defendant.

[Attornies—*Hindman & G.*, and *Shackell*.]

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First Sitting in London in Easter Term, 1834.

BEFORE MR. JUSTICE BOSANQUET.

*April 25th.*RUSSELL *v.* RIDER and Others.

A broker's man having taken possession of property under a distress for rent, after remaining two days left the house in a state of excitement bordering on insanity. The landlord thinking that his leaving had been procured by the drugging of his liquor by the parties in the house, but which was not proved, six days after broke into the house and took away the goods, without any previous demand of admission:—*Held*, that he had no right to enter again after so long a delay, and that the owner of the goods might maintain trover for them.

Where a witness on cross-examination proves the hand-writing of the opposite party to a paper, the counsel for such party has

no right to see the paper to enable him to found an examination as to whether it was really the writing of his client or not.

The rule, with respect to defendants not fixed by the evidence, is, that the verdict in their favour is to be given at the close of the plaintiff's case.

THE declaration contained counts in all the various forms usual in an action on the case for an illegal distress, together with a count in trover. The action was brought against the landlord, the broker, the auctioneer, and several others.

It appeared, that, on the 27th of December, a man named Trigg took possession of the goods in the house in question under a distress for rent, and continued in possession till the 29th; on which day he left in a state of great excitement bordering upon insanity, which was supposed by the landlord to have been produced by drugs, administered to him in liquor by the people of the house; and in consequence of this, on the 4th of January following, several of the defendants broke into the house and took possession of the things, and removed them from the premises, stating that they did it under the same authority as that under which Trigg had acted. It did not appear that any application for admission had been made between the 29th of December and the 4th of January. The authority from the landlord for the distress was not produced at the trial.

On the cross-examination of a witness for the plaintiff, *Andrews*, Serjt., for the defendants, put a paper into his hand, and he proved that it contained the plaintiff's signature.

Bompas, Serjt., for the plaintiff, desired that it might

be handed to him to enable him to found an examination of the witness, as to its being the plaintiff's hand-writing.

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Andrews, Serjt., objected.

BOSANQUET, J., said, that, according to his experience, the practice had always been not to allow it.

One of the plaintiff's witnesses said, that the plaintiff, in a conversation in which he complained of the violence that had been used as illegal, admitted that there was rent due, but said that the distress was made for more than it ought to have been.

Andrews, Serjt., submitted that the plaintiff must be nonsuited. There is no evidence to support the special counts; and the conversation destroys the count in trover, as it shews that the plaintiff admitted that the goods were taken for rent, but said that they were taken for too much.

BOSANQUET, J.—I shall not stop the case upon this objection. I do not see that there was any admission that the distress was legal.

Barstow submitted that the auctioneer was entitled to a verdict of not guilty. The case of *Whitworth v. Smith* (a) is not distinguishable from this, as the evidence shews a tenancy and rent in arrear, and the count in trover entirely fails. If the goods are in legal custody, though for too much rent in arrear, it is sufficient. A complaint of ex-

(a) Ante, Vol. 5, p. 250. A tenant owed rent to his landlord, who distrained for more than was due, and removed the goods to an auctioneer's premises. The tenant gave notice to the auctioneer not to sell, and he delivered the goods back to the person who had brought them to him; and it was held, that, as some rent was due to the landlord, the tenant could not maintain trover against the auctioneer.

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cess in taking goods admits the right to take some. There is nothing to connect the auctioneer with the taking of the goods, or the doing of the acts mentioned in the special counts.

BOSANQUET, J.—I think there is a material distinction between this case and that of *Whitworth v. Smith*, as in this case the goods were taken by violence, by breaking the door, and in the conversation the violence was adverted to. But I will take a note of the objection, and give you leave to move the Court.

Two of the defendants, against whom there was no evidence, were then found not guilty, BOSANQUET, J., observing—The new rule with respect to defendants not fixed by the evidence is, that the verdict in their favour is to be taken at the end of the plaintiff's case (a).

Several witnesses were called for the pefendant; but they failed in establishing that any act had been done by the parties in the house to Trigg, tending to produce the state in which he left possession.

Bompas, Serjt., in reply, *inter alia*.—On the 4th of January there was no right to break and enter, and the seizure and removal were illegal, and made all the parties concerned liable in trover. The case of *Woolley v. Rich* (b) bears upon this point, as it decides that recaption must be upon fresh pursuit. But, without that, the first distress must be good to justify a second entry; which is not the case here, as no authority has been shewn for the first entry.

BOSANQUET, J.—I am of opinion that the defendants

(a) See the case of *Child v. Chamberlain*, ante, p. 213.

(b) 5 M. & P. 663; 7 Bing. 651.

cannot justify the breaking into the house on the 4th of January, when possession had been left so far back as the 29th of December previous.

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Verdict for the plaintiff—Damages 70*l.* on the count in trover, against several of the defendants.

Bompas, Serjt., and *Petersdorff*, for the plaintiff.

Andrews, Serjt., and *Barstow*, for the defendants.

[Attornies—*J. Humphreys*, and *T. Hill*, and *Collier & Co.*]

Second Sitting in London in Easter Term, 1834.

BEFORE MR. JUSTICE BOSANQUET.

DENNYS and Another *v.* SARGEANT.

May 2nd.

ASSUMPSIT for goods sold and delivered. Plea—Non assumpsit.

The plaintiffs were wine merchants, carrying on business in Crutched Friars, in the city, and the defendant was a lieutenant in the 9th regiment of dragoons. The action was brought to recover the sum of 31*l.* 10*s.* for wine furnished to the wife of the defendant, who was residing in the neighbourhood of London, during the absence of her husband with his regiment in the East Indies. No proof was given of the order for the wine; but it was proved, that, on three occasions, the first being the 14th of October, 1830, and the last the 19th of February, 1831, wine to the amount above specified was delivered to the defendant's wife, part of it while she was residing in Sloane-

An officer in the army, being required to join his regiment in the East Indies, left his wife in England, and settled a certain sum upon her, which was regularly paid:—*Held*, in an action by a tradesman for goods delivered at the house in which the wife was living, that it was not to be treated as a case of separation; but that the questions for the jury were, 1st, whether the

goods supplied were necessaries, considering the condition in life of the husband; 2ndly, whether the sum of money settled was sufficient; and, 3rdly, whether it was or was not notorious in the neighbourhood that the wife was living in a style not justified by the rank of her husband: and the jury having found the first question in the negative, and the others in the affirmative, it was held that the verdict must be for the defendant.

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street, Chelsea, and the remainder while she was living at Thistle Grove, Brompton. The witness called to prove that the defendant was the husband of the lady to whom the wine was sent, stated that the marriage took place in 1825, when the defendant was scarcely nineteen; that the defendant and his wife went together to the Cape of Good Hope in 1826, and returned to England in 1828; and that, in the beginning of the year 1829, the defendant went to the East Indies, leaving his wife in England.

Talfourd, Serjt., for the defendant, submitted that there was no case for the jury. There is no proof of any order given. Also, there is no proof that the defendant would not have permitted his wife to accompany him abroad; nor is there any affirmative proof that she had not ample means of supporting herself. These are two reasons why the plaintiffs cannot recover. If a man thrusts his wife out of doors, a tradesman may trust her. But it lies on the tradesman to shew the fact of the husband having done so. It cannot be said that the plaintiffs supplied the goods to Lieutenant Sargeant, because he was in India. Probably, they gave credit to the wife, taking the chance of payment by her. But they have not shewn any order from her.

Cooper, on the same side, referred to *Manwaring v. Leslie* (a).

BOSANQUET, J.—I shall not stop the case, on the ground that there is no proof of any order, because, supposing it was a case of goods furnished to the defendant himself, the evidence would be sufficient. It has been proved that

(a) Ante, Vol. 2, p. 507. In that case Lord *Tenterden* decided, that, if a tradesman brings an action against a husband for goods furnished to his wife while she was living apart from him, it is for him, the tradesman, to shew that her so living proceeded from some cause which would justify it.

the wine was delivered at the house; and there being no complaint and no return, it is a question for the jury, whether that is not proof of an order having been given? As to the other point, according to the evidence, the defendant and his wife go out to the Cape together, and come back; and then he is ordered to join his regiment in India. It does not appear that she ever refused to go with him to India. I do not consider this as a case of separation. But you shall have leave to move, if the objections do not receive an answer in the course of your case.

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Talfourd, Serjt., then addressed the jury for the defendant, and called several witnesses; from whose evidence it appeared that the wife of the defendant lived, during the time in question, in a very extravagant style, keeping several saddle horses, and servants of various descriptions; frequenting the Opera and other places of public amusement; and also committed adultery with several persons. It was also proved that the defendant had settled upon her, previous to his departure for India, money which, with the settlement made upon the marriage, gave her an income of 166*l.* 15*s.* a year.

BOSANQUET, J., (in summing up), said—The goods are proved to have been delivered; and it does not appear that any complaint was made. One question will be, whether they were furnished by Mrs. Sargeant's direction? It appears that she was left in England by arrangement between her husband and herself. And it appears, also, that a settlement was made, and the stock transferred, and that she had an income amounting to 166*l.* and a fraction. The defendant says, first, that this provision, having been made and paid, was an adequate provision, and, therefore, he is not bound to pay for goods for her. The first question, therefore, will be, whether, the defendant having done all this, you think the provision he has made is or is not an adequate provision for her maintenance? Then

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you will consider whether the amount of goods furnished to Mrs. Sargeant, supposing her not to have been guilty of misconduct, and not to have had any provision, was, for a woman in her situation, more than would be considered necessary for her state in life, between the 14th of October and the 19th of February. But there is another question on which I wish you to give me your opinion. It appears, that, after the defendant left England, his wife lived in a very improper manner, and the adultery is, in fact, admitted. But, it is admitted, on the other side, that the plaintiffs had no personal knowledge of her mode of living. But the question which I wish you to answer is, whether it was notorious in the neighbourhood that she was living in a style beyond the rank and condition of her husband; because this may be material. When you have answered these questions, I will say what in my opinion the effect of your answers is upon the case.

The jury, having made some inquiries respecting the pay of a lieutenant of cavalry, after considering the evidence, said—First, that they thought the quantities of wine supplied were not necessities according to the condition in life of the defendant; secondly, that the provision made by the defendant for his wife was quite sufficient; and thirdly, that it was notorious in the neighbourhood that the defendant's wife was living in a style of expense beyond what was justified by the condition in life of her husband.

BOSANQUET, J.—Then I think the verdict should be for the defendant.

Verdict for the defendant.

Andrews, and *Coleridge*, Serjts., and *Payne*, for the plaintiffs.

Talfourd, Serjt., and *Cooper*, for the defendant.

[Attornies—*Alliston & Co.*, and ———.]

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May 3rd.

THE first count of the declaration stated, after the usual introductory averments, that the defendant, on the 18th of February, 1834, appeared before Sir John Key, one of the justices of the peace for the city of London, and there falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having feloniously stolen divers goods and chattels, to wit, a pair of pistols and a bag of trusses; that the justice refused to entertain the charge, and dismissed it; and that the defendant had not further prosecuted, but abandoned his complaint; and the same was wholly ended and determined. The second count stated, in substance, that, before the committing of the grievances, &c., one Thomas Lane was possessed of a pair of pistols, a pair of spurs, and two trusses, and died intestate on the 9th of February, 1834; and that the plaintiff and one Margaret MacMahon, by the leave of the sister and next of kin of the deceased, took possession of the pistols, spurs, and trusses, and disposed thereof for their own benefit, without any felonious or dishonest act or intent; yet the defendant, intending to injure the plaintiff, and to have it believed that she was guilty of stealing them, said of the plaintiff and Mrs. MacMahon, "I have got something here that will send them to the Old Bailey, if they do not mind what they are at; and I will spend thirty or forty pounds upon it, but I will serve them out. They have regularly robbed him (meaning the deceased)."

To maintain an action against a person for having made a false charge of felony before a magistrate, it is not necessary to shew that the charge was taken down in writing and acted upon by the magistrate. But it is necessary that the jury should be satisfied that it was made to the magistrate, with a view to induce him to entertain it as a charge of felony.

The defendant pleaded not guilty.

According to the testimony of the witnesses called on the part of the plaintiff, it appeared, that, in consequence of a quarrel which had taken place at the funeral of a deceased lodger of the plaintiff and her sister, Mrs. MacMahon, (who jointly kept a lodging house), an assistant of the defendant (who was the undertaker employed) summoned

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the plaintiff, her sister, and one of the lodgers, on a charge of assault; that the defendant attended the hearing before Sir John Key; and when the charge of assault was dismissed, the defendant stood forward and said, "I have another charge to make against Mrs. Clarke and her sister," adding that "it was a charge of felony for abstracting two pistols, a bag of trusses, and a pair of spurs, from the property of their late lodger." They stated further, that the magistrate dismissed that charge also. In support of the second count a witness was called, who was clerk to the plaintiff's attorney, and he stated, that, by desire of the plaintiff, he went with the party before the magistrate; and that, before they were called in, he saw the defendant in Guildhall Yard, and asked him if it would not be much better to let the matter drop, or that all parties should be bound over to keep the peace towards each other; and that the defendant replied, he would do no such thing, and followed up the remark by saying he was determined to serve them out; and then, pointing to a bundle which he had under his arm, used the words mentioned in the declaration. A lady, who was a cousin of the deceased lodger, and who attended at the house on behalf of his sister, to take charge of his property, was also called on the part of the plaintiff. She stated that she packed up every thing with the assistance of a servant; that there were a variety of dirty articles lying about; that she did not see either spurs or pistols, but did see some trusses on the bed; that she examined every thing, intending to take away every thing of value; that had she seen any pistols or spurs, she should have thought it right to pack them up; and that she said to the plaintiff and her sister, that all that remained in the room she considered as rubbish; and, if any thing was of use to them, they might have it.

Prendergast, for the defendant, submitted, that, with respect to the second count, there was nothing for him to

answer, as the averment that the plaintiff had the articles by gift from the deceased's sister had not only failed of proof, but had rather been negatived.

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BOSANQUET, J.—There are the words, “They have regularly robbed him.” You may reject the introductory averment, if the words set out in the count are sufficient without.

Prendergast then addressed the jury for the defendant, and called several witnesses, who denied that any charge of stealing was made by the defendant before the magistrate, after the dismissal of the charge of assault, as stated by the plaintiff's witnesses. They admitted that the defendant did say something about the trusses and pistols, but said that it was during the progress of the case of assault. They also swore that the defendant had not any bundle under his arm. One of them, a police constable, stated, in addition, that, on the Monday morning previous to the hearing of the assault case, he saw the plaintiff, and asked whether she had removed any property, or whether any property of the deceased had been given to her, either directly or indirectly; to which she replied—“No, not to the value of one farthing.”

BOSANQUET, J., (in summing up), said—This action is brought upon two grounds: first, for a malicious charge made before a magistrate; and, secondly, it is an action of slander. With respect to the second ground, no justification is put upon the record; and you will, therefore, have to consider whether the words were spoken, and spoken in the sense alleged in the declaration, viz. of taking the property feloniously. As to the first count, the first question is, whether any such charge was made before the magistrate, aye or no. It has been suggested by the defendant's counsel, that it must be taken down in writing, and acted on. I am not of that opinion. But I am of

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opinion that it must be made to the magistrate, with a view to get him to entertain it. The question is, first, was the charge made seriously before the magistrate for the purpose of his entertaining it as such? and, if it was, then was it made without reasonable and probable ground—this is partly a question of law and partly of fact; and, then, thirdly, if there were reasonable and probable grounds for the charge, was it made maliciously on the part of the defendant? [His Lordship stated the facts to the jury, and observed:]—If what the policeman said is true as to the conversation with the plaintiff on the Monday, and he communicated it to the defendant, then I cannot say that it may not be evidence of reasonable and probable cause. Then comes the question whether the charge was made maliciously? The second count of the declaration has a double aspect, as a substantive complaint, and also as shewing malice. His Lordship observed upon the contradictory evidence, with respect to the defendant's having a bundle under his arm; and left the case to the jury, who returned the following verdict—

“ The jury find that there was no direct charge of felony before the magistrate. On the second count, we find the slanderous expressions have been used, for which we give damages 25*l*.”

Verdict for the defendant on the first count;
 and for the plaintiff on the second count
 Damages—25*l*.

Talfourd, Serjt., and *Payne*, for the plaintiff.

Prendergast, for the defendant.

[Attornies—*Aston*, and *In Person*.]

COURT OF EXCHEQUER.

Second Sitting in Middlesex, in Easter Term, 1834.

BEFORE MR. BARON GURNEY.

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HARDING and Wife *v.* KING.

April 30th.

ASSAULT.—Pleas, first, general issue; second, *son assault demesne*. Replication, *de injuriâ*.

On the part of the plaintiff, evidence was given of an assault committed by the defendant on the plaintiff's wife.

B. Andrews, for the defendant, proposed to put in a certificate, signed by Mr. Murray and Mr. Trail, two magistrates, given under the stat. 9 Geo. 4, c. 31, ss. 27 and 28(a), they having heard the complaint, and dismissed it, awarding the costs of the summons to be paid by the defendant.

If a party be charged before two magistrates with an assault, and they dismiss the complaint, giving him a certificate under the stat. 9 Geo. 4, c. 31, s. 27, he cannot avail himself of this certificate as a defence to an action for the same assault, unless it be specially pleaded.

Platt, and *Steer*, for the plaintiffs, objected that the certificate ought to have been specially pleaded.

B. Andrews, for the defendant.—The words of the statute are, that if the party “shall have obtained such certificate, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.”

GURNEY, B., (having conferred with the other learned Barons).—We are unanimously of opinion that this certificate ought to have been specially pleaded. The sta-

(a) Set forth Carr. Supp. 339, and Chit. edit. of Burn's Justice, Vol. 1, p. 271.

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tute does not enact that it shall be given in evidence under the general issue. Whenever a statute gives a defence, it should be specially pleaded. It is so, where either a bankruptcy, or a discharge under the Insolvent Act, is to be used as a defence, or where the Statute of Limitations is intended to be relied on.

The certificate was not put in.

The case went on upon its merits; and the jury found a verdict for the defendant, on the plea of *son assault demesne*.

Platt and Steer, for the plaintiff.

B. Andrews, for the defendant.

[Attornies—*Rhodes & B.*, and *Hornidge*.]

COURT OF COMMON PLEAS.

Adjourned Sittings in London, after Easter Term, 1834.

BEFORE LORD CHIEF JUSTICE TINDAL.

LAWRENCE v. POTTS.

May 30th.

An attorney, who has commenced an action for his client, has a right to refuse to go on without an advance of money on account, provided he gives his client sufficient notice of his intention to enable him to make the required provision.

ASSUMPSIT on an attorney's bill.—The costs were incurred in conducting an action of ejectment, in which the sanity of the defendant's father, who had made a will, and bequeathed his property away from the defendant, was the main question. The plaintiff conducted the case up to the time for delivering briefs to counsel, having several times, from the month of April to October, required the defendant to furnish him with money on account. He

If an attorney has *reasonable and probable grounds* for commencing an action, and desists from prosecuting it, because he *afterwards* discovers that the cause cannot be successfully proceeded with, he is entitled to recover his costs from his client.

did not do so, and the result was, that a rule was made absolute for judgment as in case of a nonsuit.

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Atcherley, Serjt., for the defendant.—An attorney cannot stop short because the funds are not forthcoming, and suffer his client's claim to be defeated on that account. The question is, whether an attorney, who has brought a cause up to the time for delivering briefs to counsel, and then stops, can maintain an action for his bill? Also, if a man brings an action, which he knows has no foundation, to induce the other side to come to some terms, his conduct is not justifiable either in law or morals. An attorney cannot recover in respect of an action he advised and brought, if he had not at the time any fair and sperate ground of success.

Several witnesses were called for the defendant, from whose evidence it appeared, that the plaintiff had received 10*l.* on account before issue was joined in the action of ejectment; and that after issue joined he said he should not carry the cause into Court unless he had a sum of 25*l.* They also stated that the plaintiff said, at one time, there was a good cause of action, and he had no doubt he should not be obliged to call all his witnesses. At another time he said, there was one very important witness, if they could get hold of him, viz. the barber who shaved the testator. But it did not appear that they had ever heard him say any thing in discouragement of the action until after he had abandoned it, and delivered his bill of costs.

Wilde, Serjt., in reply.—It appears that the plaintiff continued, from April to October, asking at intervals for a sum of 25*l.*, which, on their offer, he agreed to take instead of 31*l.* *Van Sandau v. Brown* (a) is the latest

(a) 2 Moore & Scott, 543. That is desirous of giving up the conduct of a cause, he must give his

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decision as to the law of the case. A man is not to turn round on the sudden; but if he gives reasonable opportunity to the client to furnish the money, and it is not furnished, he is not bound to go on without it. In the present case, the demands from April to October furnished such reasonable opportunity, and gave the defendant due and fair notice of the plaintiff's intention.

TINDAL, C. J.—This is an action to recover the sum of 31*l.*, being the balance of a bill for business done by the plaintiff as an attorney. There is no doubt that the business has been done, and no objection is made to the charges. It is said, on the part of the defendants, that, as the attorney carried on the cause till it was just time to take it into Court, he has no right to stop short for want of funds. I do not think that is any legal answer to the claim in the present case. If the plaintiff had undertaken the cause on an agreement to advance all the funds, he could not turn round afterwards, and refuse to go on unless money were furnished. But there is not any proof of such an understanding between the parties. Still, however, an attorney has no right just at a pinch to say, I will not carry your cause any further without an advance of money. But here, there was sufficient notice from April to October. The early part of the cause is not in dispute. All goes on regularly till the time for carrying it into Court. It is well known that keeping witnesses and delivering briefs are heavy expenses. An attorney has a right to say, I will not be your banker for all expenses. He has a right to refuse to go on without funds, provided he does not do it in a hurried manner, and take his client by surprise, when he has no time to make provision. I am, therefore, of opinion that this ground of defence com-

client reasonable notice of his intention to do so; and after he has given such notice he may sue for the costs incurred while he con-

ducted the suit, and is not obliged to wait till its final determination."

pletely fails. The second ground of defence is, that the action of ejectment ought never to have been brought. But it is to be considered upon this part of this matter, that a party states his own case to his attorney, and there is no doubt, that, up to a certain time, the plaintiff thought there was a good cause of action. If he had reasonable and probable ground for commencing it, and desisted only for the want of funds, or because he afterwards found that the cause could not be sustained, then he will be entitled to recover for his work and labour.

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Verdict for the plaintiff—Damages 31*l*.

Wilde, Serjt., and *Chandless*, for the plaintiff.

Aitcherley, Serjt., and *Hoggins*, for the defendant.

[Attornies—*Lawrence & Co.*, and *Chester*.]

Sitting in London after Trinity Term, 1834.

BEFORE MR. JUSTICE PARK.

(*Who sat for the Lord Chief Justice.*)

CHUBB v. FLANNAGAN and Another.

CASE for a libel in the Horticultural Journal and Florists' Register.

It appeared that the plaintiff, who had previously been in business as a linen-draper, was for several years in

June 14th.

A libel contained in an advertisement by two tradesmen in partnership, stating that they deemed it necessary to caution their

friends against a *fraudulent representation* that any part of *their business had been removed*, it being obvious that their concern was still carried on solely at No. 9, *Mansion House Street*, and that they had no connexion with a shop recently opened in another place under circumstances *grossly misrepresented, and highly discreditable*, with a view of *defrauding* them of a part of their business, is not justified by proof that the person alluded to (who had been for several years in partnership with them), had issued a bill, in which, after thanking his friends for their favours during his residence at No. 9, *opposite the Mansion House*, he stated that he had *removed his establishment* to another place, where the business would be carried on under the firm of R. R. C. & Co.; and, in addition to this, had put over his shop door, "R. R. C. & Co., removed from *opposite the Mansion House*."

If the publication of a libel consists in merely selling a few copies of a periodical, in which, *inter alia*, it is contained, one question for the jury is, did the parties know what it was they were selling.

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partnership with the defendants, Messrs. Flannagan & Nutting, and that the business of the firm was carried on at No. 9, Mansion House Street. This partnership having been dissolved, the defendants continued to carry on the business in the same premises, and the plaintiff took premises and set up business in Newgate Street. Upon doing so he issued printed bills, notifying his place of business, &c., which he circulated among the trade. They were in the following form:—

“ R. R. Chubb begs to return his most sincere thanks to his patrons and friends for the very liberal favours conferred upon him during his residence at No. 9, opposite the Mansion House; and to inform them of his having removed his establishment to Nos. 10 and 11, Newgate Street, near the General Post Office, where the seed and florist's business will be carried on in all its departments, under the firm of R. R. Chubb & Co.

“ This firm, from their extensive connexions on the Continent,” &c.

The bill contained a great many other particulars, all of them speaking of “ the firm,” or mentioning the name “ R. R. Chubb & Co.”

In addition to this, the plaintiff caused this inscription to be placed over the door of the premises in Newgate Street—“ Chubb & Co., Seedsmen and Florists, removed from opposite the Mansion House.”

The defendants, conceiving themselves aggrieved by this conduct on the part of the plaintiff, caused to be inserted in the 7th number of the Horticultural Journal and Florists' Register, published on the 8th of February, 1834, an advertisement, which, after stating that they would have ready for delivery in May a quantity of dahlias, describing them in a long list, proceeded as follows:—

“ Messrs. F. & N. consider it almost unnecessary to state, that, after fifty years' experience, their seeds, &c., are selected from the best stocks; but they deem it necessary to caution their friends against a fraudulent repre-

sentation that any part of their business has been removed from the old established concern, it being obvious to all who know them that the concern is carried on solely at No. 9, Mansion House Street, and that they never had the most remote connexion with the shop recently opened in another part of the town, under circumstances grossly misrepresented and highly discreditable, with a view of defrauding them of a part of their business."

In the body of the same number in which the advertisement was inserted, under the head "Chit Chat," the following paragraph appeared:—

"Messrs. Flannagan & Nutting, whose shop, opposite the Mansion House, was, during the whole dahlia season constantly supplied with a splendid show of blooms, have announced that their dahlias, comprising every known variety, will be ready for delivery in May. By the way, one of the most impudent attempts to draw off part of the connexion of this highly respectable firm has been ineffectually made, by a fellow, the very sight of whom, to say nothing of his conversation, would convince a man that any thing above a linendraper's porter was beyond his capacity, though he possesses all the low cunning of an experienced impostor. The character is, however, written upon his brazen face in such legible terms that he could hardly take in an idiot."

These two articles formed the libel complained of. The only evidence to connect the defendants with the article headed "Chit Chat," was that of a clerk to the plaintiff's attorney, who proved that, having previously seen in the shop window of the defendants, the number in which the advertisement was, which had, as a frontispiece, an engraving of the Queen Adelaide tulip, he went into the shop; where both the defendants were, and asked the price of the tulip represented in the engraving; and, on being informed, asked if the number which contained the engraving had any article which would teach him how to train up the flower, if he bought it. The defendant Nutting replied—"Probably it does." Upon his asking for one,

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the same defendant told him that he had not one at present; that he had sold several; but that, if the witness would look in again, he would let him have one.

Several witnesses, who were in the seed trade, proved that, in their opinion, both articles applied to the plaintiff, and could not, from the peculiar circumstances mentioned in them, be considered as applicable to any other person.

The printed bill, circulated by the plaintiff, was mentioned in the declaration, in the introductory allegation to all the counts; and it was averred, that the object of the defendants was to misrepresent and cause it to be misunderstood. It was, therefore, of course, produced in evidence on the part of the plaintiff. The defendants pleaded the general issue to those counts which contained the part under the head of "Chit Chat," and a justification as to those counts which only set out the advertisement.

Talfourd, Serjt., for the defendants, contended that the plaintiff's printed bill was in itself proof of the truth of the statement in the advertisement; and with respect to the other part, though the defendants might, in strict law, be answerable for it, yet, as they only sold a few copies, and were not proved to be in any way connected with the authorship, it was only a case for very small damages. He submitted that the plaintiff had not acted ingenuously, as the public would reasonably conclude by his bill and the inscription over his door that the whole firm of which he had been a member, and not one partner only, had removed to Newgate Street. He also remarked on the circumstance that two other actions for the same libel against the printer and the publisher followed in the cause paper, which could not be necessary to answer the ends of justice.

PARK, J., in summing up, after remarking that the jury had nothing to do at present with the other actions, *inter alia*, said—There are four questions for your consideration in this case; the first, whether the defendant published the articles complained of? the second, whether those articles

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apply to the plaintiff? the third, whether you consider that those articles are a libel? and the 'fourth, what damages you think the plaintiff is entitled to? As to the part under the head of "Chit Chat," the question for you will be, did the defendants know what they were selling (a)? It seems that a witness asked whether the book would teach him how to train up the flower of which it contained a drawing. The answer of one defendant in the presence of the other was, "Probably it does." You will consider whether this does not shew that they were acquainted with the contents of the book they were selling. With respect to the advertisement, a justification is pleaded to those counts in the declaration which are confined to it. Upon the part of the defendants, no evidence is offered in support of such plea; but it is said, that the inscription over the door and the printed bill shew that the plaintiff intended to have it understood that all the firm of the house in Mansion House Street had removed to Newgate Street. The common sense of the thing appears to me to be, that he meant to intimate that his part of the establishment, and not all the individuals composing it, had been removed. It is for you to say, whether the articles complained of are a libel or not. I should be justified in giving you my opinion upon that point; but I shall not do so, as I imagine you will have no difficulty in coming to a right conclusion. The question of damages is wholly for your consideration. You will say, whether a justification put on the record, and not substantiated by evidence, (unless you think it is proved by the evidence on the part of the plaintiff), is not an aggravation of the original offence.

Verdict for the plaintiff—Damages, 50*l*.

Wilde and Coleridge, Serjts., and *Follett*, for the plaintiff.

Talfourd, Serjt., and *Bere*, for the defendants.

[Attornies—*Harris*, and *Lane & P.*]

(a) See *Smith v. Wood*, 3 Camp. 323; *Rex v. Amphlett*, 4 B. & C. 35; and Com. Dig. Lib. B. 1.

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March 14th.

CHUBB v. WESTLEY.

On the trial of an action against the publisher of a monthly periodical for a libel contained in it, articles published from month to month alluding to the action, and attacking the plaintiff, are receivable as evidence *quo animo* the libel was published, and as shewing that the publisher of the work considered it as applying to the plaintiff.

IN this case, which was an action for the same libel, against the publisher of the "Horticultural Journal," *Wilde*, Serjt., in stating the case for the plaintiff, observed, that, after the verdict in the former case, he would not have proceeded with the present, but for certain remarks which had from month to month been made in the same journal on the subject of this libel, and the parties who were supposed to be concerned in the actions for it. He was proceeding to read some of those articles, when—

Talfourd, Serjt., for the defendant, objected that they were not admissible, as they might be the subject of another action.

PARK, J., was of opinion, that they were admissible, as shewing the motive of the defendant *quo animo* the former libels were published, and also as shewing that the defendant himself considered those libels as applying to the plaintiff (a).

After *Wilde*, Serjt., had stated the case for the plaintiff, *Talfourd*, Serjt., expressed the regret of all the parties concerned in the publication, and promised, on their parts, that the injury should not be repeated.

A verdict, by consent, was then taken in this and the next case, which was against the printer of the journal, with 40*s.* damages in each.

(a) See the cases on this subject, collected in Roscoe, Dig. of Evidence at N. P., tit. "Case for Defamation"—"Evidence of

other Words or Libels," 2nd edit. p. 293; and see *Hunt v. Alger*, ante, p. 245.

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Sittings in London after Hilary Term, 1832,

BEFORE LORD CHIEF JUSTICE TINDAL.

LANCUM *v.* LOVELL (a).

Feb. 21st.

DEBT for tolls claimed by the plaintiff as lessee under the mayor and burgesses of Northampton, for carriages passing through a certain street at Northampton, and for cattle sold in the market there. Plea—Nil debit (b).

In an action of debt by the lessee of the corporation of N. for toll traverse for a waggon, and a market toll for cattle, it was held that an information quo warranto by the Attorney-General of Queen Elizabeth against the corporation, in respect of the customs they claimed and used, was not receivable in evidence, as it did not appear that it was prosecuted, such an information, like an indictment, not being evidence, unless there be the finding of a jury upon it:—

Wilde, Serjt., for the plaintiff.—We shall shew that the crown had the soil, and granted it with all privileges to the town of Northampton, at a rent originally of 120*l.*, but which has been since reduced. There were proceedings on a quo warranto in Queen Elizabeth's time, which were abandoned by the then Attorney-General, and a new charter was granted in the forty-first year of that reign. If tolls are of such a nature that a good legal origin *can* be, it *may* be, presumed: and in this case, after the length of time during which the tolls have been collected, such an origin may be fairly presumed. We shall shew a demand of and payment by all carts met with of the description of that sought to be charged by this action. Sometimes the toll was collected by the servants of the corporation, and sometimes by their lessees. Thus far as to the toll traverse. Then, as to the market toll, a charter was granted in the reign of Elizabeth, which is sufficiently distinct in this respect; and another in the reign of George the Third.

Held, also, that an exemplification of a judgment in an action of trespass by the corporation, for setting up a stall in a market, with a

justification pleaded of such right without paying toll, was not inadmissible, as it might connect itself with the issue in the progress of the cause.

For the other points decided, see the margin of the respective parts of the case to which they apply.

(a) This case would have been published in its order, but the notes of it were mislaid, and were not found till lately. The new trial, which was granted on one point

only, has not taken place, on account of the death of the plaintiff.

(b) This plea is put an end to by the new rules, H. T. 4 Will. 4.

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On the part of the plaintiff the following evidence was produced :—

An examined extract from the Pipe Roll in the fifth year of King Stephen, 1140, was produced by Mr. Henry William Hewlett, and translated by him as follows :—

“ Robert Revill renders account for the town and borough of Northampton, &c.

“ 29 Henry II., Thomas Fitzbourne renders, &c. The same sheriff renders account for the town and borough of Northampton.”

A charter was then produced from the muniments of the corporation, of the first year of Richard I (1189). It granted that all the burgesses of Northampton should have certain privileges, and all other liberties and free customs which the citizens of London had, rendering 120*l.* for the town of Northampton, with all the appurtenances. Then was produced a charter of 52 Hen. 3, reciting the former, and speaking of the impediment of war, and confirming the former privileges, notwithstanding the effect of such impediment. An examined copy of a special commission, 2 Edw. 1, from the Patent Rolls in the Tower was then put in; it contained authority to certain persons assigned to inquire of the acts of sheriffs in different counties, and among them the county of Northampton, and what demesne lands there were, and what suits, customs, services, and other things had been subtracted from the king, and who had subtracted them. An extract was then produced of the Record of the Receipts of the Exchequer at the Chapter-house at Westminster, containing the inquisition found upon the commission. With respect to the town of Northampton, it mentioned (*inter alia*) that the master of the hospital had withdrawn his tolls for goods sold in the market, by what warrant the jury knew not, to the damage of the lord the king and the burgesses of Northampton; and that the Earl of Cornwall had withdrawn certain customs which the king

was accustomed to receive on the king's highway at Billing.

The deputy town-clerk (Mr. Sawbridge) proved that Billing was two or three miles from Northampton, and he had heard that Lord Pomfret took tolls there for the duchy of Cornwall. The inquisition also mentioned several other matters, the object of introducing which in evidence was to shew that the soil was in the crown.

Two charters were produced, one of 38 Hen. 6, and the other 11 Hen. 7. The latter gave to the mayor, bailiffs, and burgesses of Northampton power to elect a recorder, and stated that the same fairs or markets be to continue every year for ever. It confirmed all customs, by whatsoever name they used to have them, which from time of memory the corporation were accustomed to have, although they had been accustomed to abuse or had not used them.

A charter of 1 Hen. 8 was produced, which recited the grant of the town of Northampton at 120*l.* a year.

The deputy town-clerk stated, that the corporation now paid 98*l.* a year, and had done so ever since he had known any thing of the town.

The next piece of evidence was of a quo warranto by the attorney in the reign of Queen Elizabeth, stating that the mayor, bailiffs, and burgesses had used without warrant, &c. No return was made by the sheriff; but there was an entry that the attorney-general had been inquired of if he intended further to prosecute it.

Sir *J. Scarlett*, for the defendant.—This is not receivable in evidence. It is a mere information, to which the party never appears, and on which no judgment is given. If any judgment had been given the proceeding would have been evidence.

Wilde, Serjt., for the plaintiff.—The discontinuance is a fact we can prove. It is competent to shew a prosecu-

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tion by the Crown, afterwards abandoned. It is competent to shew any public prosecution, and the object here is to introduce a new charter granted in the following year.

TINDAL, C. J.—I am inclined to think that it is not receivable in evidence; upon this ground. The only cases in which judgments of this description have been admitted, have been those in which the matter has gone before a jury of twelve men, and therefore is matter of public notoriety. It is an endeavour to perpetuate evidence.

Sir *J. Scarlett*.—An indictment upon which nothing had been done would not be evidence.

TINDAL, C. J.—That is so; I shall reject the evidence. Go on to the next charter.

A charter of the 41 Eliz. (the next year to the quo warranto) was read. It contained a confirmation of privileges; and used these words, "that they may have and keep as heretofore accustomed a free market or fair, with all such reasonable tolls, and tolls for beasts, &c., as may legally be taken, and as they have been accustomed."

An exemplification sealed of a judgment in the King's Bench in a case of *The Mayor of Northampton v. Ward* (a) was produced from the muniments of the corporation. The record was read, and stated that the declaration was in trespass for putting up a stall in the market.

Sir *J. Scarlett* objected.—It is not relevant. The true nature of it is to shew a right of soil, and that as against an individual has nothing to do with a right to take toll.

TINDAL, C. J.—I cannot say that it may not connect it-

(a) 2 Strange, 1238.

self with the issue as the cause proceeds. The justification is of a right to set up a stall without paying toll. I cannot say that it may not be evidence to affect the question in issue.

The reading of the record proceeded.—There was a traverse by the plaintiff of the custom pleaded by the defendant, and the jury found that there was no custom for a butcher to erect a stall free of stallage, and assessed damages for the mayor and burgesses.

A charter was then produced of the 36 Geo. 3. It recited that the corporation by former charters had enjoyed certain privileges, and that they had petitioned for their confirmation. It mentioned one fair or mart, and used the words “give, grant, ratify, and confirm that they may have and hold like as heretofore a free market on every Wednesday.” It mentioned tollage, courts of pie poudre, &c., and reasonable toll or tollage for the sale of beasts, &c., as well in the market as any other place, and as they had been accustomed. It confirmed all former grants and charters, and all those customs which they had reasonably used and exercised, &c.

A counterpart of a feoffment, dated May 8, 1617, from the corporation to one Rainsford, of a hogsty, yard, and garden, was produced from the corporation records. It contained a covenant by the mayor, bailiffs, and burgesses to permit all the charters they had in their custody to be produced for the defence of the title.

Sir *J. Scarlett* objected.—The deed itself is only evidence when it goes along with the possession. But this, being the counterpart, is not evidence at all.

Wilde, Serjt.—It is material evidence of the muniments of the corporation to shew that they have been in the habit of making grants; and, if they take a counterpart,

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A counterpart of a feoffment by the corporation to an individual of land, &c. in the town of Northampton, produced from among the corporation muniments, was held inadmissible, it appearing that no rent was received in respect of the property.

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that is evidence of their common course. After the leases have expired, the counterpart is reasonable evidence.

Sir J. Scarlett.—The deed is not received as evidence of an admission by the party; it is only received in evidence to explain the possession; and a title deed of what he has conveyed away cannot be evidence for him. It is only a signature by a party who is not a party to this record.

TINDAL, C. J., inquired of the deputy town-clerk whether rent was payable to the corporation in respect of the property, and, being answered in the negative, said—It seems to me that it is not evidence.

Several leases granted by the corporation to tenants of land, &c. were put in, of various dates, between the 24th June, 1687, and the 18th October, 1826.

A lease of tolls from the corporation to one Gibson, dated 19th December, 1765, was then put in. It was of tolls called the great tolls, and the tolls at any of the fairs on the sale of all sorts of cattle bought and sold within the liberties of the said town of Northampton, and which were lately collected by the two bailiffs of the same town for the time being; and also all other the usual tolls arising from divers cattle and various sorts of goods, wares, and merchandizes brought to or travelling through the said town of Northampton, and which have been for many years last past let to and collected by Elizabeth Knop, widow, at the Magpie, situate in the south quarter of the said town; and also all and singular other the tolls arising from all and every or any of the markets held in the said town for all sorts of live cattle bought and sold within the liberties of the said town, and also the tolls called the pickage or stallage, and St. George's pence, and all other the tolls, perquisites, and profits which have been for se-

veral years last past let to and collected by William Annan. Out of which said tolls and other tolls collected in the said town, 66*l.* 13*s.* 4*d.* was sometime since granted by the crown to the dean and canons of Windsor; and 81*l.* 6*s.* 8*d.*, other part of the said tolls, was since also granted by the crown to the Earl of Nottingham, in fee farm, saving and excepting to the said mayor, bailiffs, and burgesses, their successors and assigns, tolls arising upon corn, fruit, fish, and other eatables, to hold for seven years, yielding and paying the yearly rent or sum of 87*l.*, being part and parcel of the said several fee-farm rents." Mr. Sawbridge, the deputy town-clerk, proved that the two above-mentioned sums continue to be paid, and that Gibson, the lessee, had been an alderman of Northampton, but was dead. On his cross-examination he said that the Magpie was near the South Bridge, in Bridge Street, and that there was a toll taken at Bottom End, within 100 yards of the bridge, which he always understood was for the bridge under Lord Pomfret. Several agreements for the letting of the tolls in 1799, 1800, 1801, and 1805, were produced—the several leases, which it was stated had been made after that granted to Gibson, not being to be found upon search.

A book, purporting to contain the accounts of the town treasurers from 1765 to 1782, was put in; the entries were in the hand-writing of the then town-clerk. The present town-clerk, who had been in office above thirty years, proved that the course was for the town-clerk to receive information from the treasurer, and enter it in the book, and for the treasurer to attend the auditors, unless prevented by illness or accident, and verify by the

(the treasurer's) accounts, and also for the treasurer to attend before the auditors, unless prevented by illness or accident, and produce vouchers verifying the town-clerk's statement. Entries in books of that description, commencing with the year 1766, were tendered in evidence. Some of them were signed by the auditors as allowed, and to some of them appeared only an unsigned entry of their having been examined:—Held, that those which were signed by the auditors were admissible without proof of any attendance by the particular treasurer before the auditors, or of any entry in his writing, charging himself: partly on the ground that there was reasonable evidence of his having made the town-clerk his agent for the making out of the accounts.

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It was proved that it had been the practice, as long as the witness who was conversant with the subject could remember, for the town-treasurer to furnish the town-clerk with information, from which he made out his

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production of vouchers the items taken down by the town-clerk, after which the auditors signed the allowance of the account (a).

Sir *J. Scarlett*, objected.—If there had been proof of attendance by the treasurer before the auditors it would be evidence, because it would be proof in an action against him for money had and received. But the evidence of the town clerk only proves a custom; and suppose an action had been brought against a treasurer, the evidence of its being usual for the treasurer to attend before the auditors, without shewing that he did attend, would not be sufficient.

TINDAL, C. J.—Perhaps that would not do if it had occurred within the memory of any living witness, but it is going far back.

Sir *J. Scarlett*.—The decisions have never gone farther than to admit proof of the handwriting of the deceased person charging himself. The signature of the auditors does not make it any more evidence.

Wilde, Serjt.—It is reasonable evidence. It is not to be assumed that a public officer would not act according to the course and practice of the corporation. The account is on the face of it in the ordinary and accustomed course. The signature of the treasurer is not necessary, if it appear that he rendered the account charging himself. The practice would be evidence against him unless he shewed that he did not attend; besides, he has access

(a) It was proved that the deceased treasurer himself kept a book, but no such book could be found on search among the cor-

poration papers, nor was any such in the possession of his representatives.

to the corporation books, and allows their entries to remain unaltered.

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Sir J. Scarlett.—I agree that it is not because he writes merely, but because he charges himself. The writing is the evidence of his charging himself; but here he is charged by other people. According to the evidence of the practice, it does not appear that the account is not passed in his absence. The town-clerk's evidence only comes from the year 1790, and we cannot infer what it was thirty years before. The account on the face of it is a charge against the treasurer by some other people; they must shew that the treasurer was there, or they cannot give it in evidence.

TINDAL, C. J.—It seems to me that there is a distinction between different parts of this book. As to some, the accounts purport to be allowed by certain persons in office: as to others, there is only the handwriting of a clerk—"this account was examined." I think, in a case where an account is made out and submitted to the mayor, and signed by the proper officers, I am bound to receive it in evidence. It appears to me, on this ground, the only question is, whether there is reasonable evidence that the treasurer made the town-clerk his agent in drawing up the account. It seems to me that the only way in which it can be made out, as it is in the town-clerk's writing, is by the treasurer's furnishing him with vouchers. The testimony goes as long back as any person living can give evidence, and I think it may be taken that the same course prevailed at an earlier period. But I will take a note of the objection.

Several items were read of the receipt of rent from the farmer of the tolls, commencing with 1766.

The lease to the plaintiff was put in, dated in 1829.

Several old witnesses were called, who proved the payment of two-pence for every loaded cart or waggon passing

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along the street of Northampton. Several collectors of the tolls proved that the load was two hundred weight or upwards; but one said, that the toll was taken for a cart if it contained any luggage at all. Several witnesses also proved the payment of a penny for every beast brought to the market. Some of the collectors made agreements with carmen and the owners of waggons in the neighbourhood instead of taking the toll every time.

To shew the reasonableness of the market toll, it was proved that it was the same as was paid at other places in the same county. It appeared that there were certain butchers living out of the town who rented stalls in the market under the corporation, and the collectors were desired to abstain from collecting the toll for their carts. Examined extracts from the Pipe Roll, 31 Hen. 2, and 3 Ed. 1, were read; the former contained these passages—"William Fitzurbun renders account for the town of Northampton. The burgesses of Northampton render 100 marks for having their town in chief of the king. The same sheriff renders account of 60s." The latter extract, which was of a return to a commissioner, said—"The town of Northampton, which used to be holden," &c. "is now holden in chief of the king." Also, "the burgesses of Northampton have therein free courts, pillories, coroners, &c., and this by grant of our lord the king." It was further proved that the beast market had been very small, only three or four beasts coming every week till the year 1802, in the time of a very active mayor, when an advertisement was inserted in the papers stating that a market would be held regularly; and from that time it had increased considerably. A board was put up at the collector's house, stating, that, if either buyer or seller were free, then only half toll would be demanded.

Sir *J. Scarlett*, for the defendant.—I never knew a case where the evidence of perception of tolls was so slight, of so short a date, and so unsupported by docu-

ments. There is a difference between a corporation claiming and an individual claiming. Where an individual claims, a defendant is contending with his equal; but when a corporation claims, it is done at the public expense; and in such a case an individual may pass by instances on the ground of being deterred by the expense of resisting. An individual also is subject to accidents, which do not affect corporations. An individual may be a minor, or a married woman, and the agent or the husband may not take the trouble to enforce the right; such a person's documents also may be withdrawn. But a corporation has a perpetual existence—no minority, no coverture; it has public officers, and public offices for records. It often happens that private corporation documents are older than any public records; and in this very case there is a charter produced by the corporation of 1 Ric. 1, which we cannot find in the Tower. Therefore, I say a jury ought to be exceedingly suspicious of the evidence of perception of tolls claimed by a corporation when supported by modern instances, without any entry in the corporation books of an early date. This might be good evidence in the case of individuals; but in the case of a corporation it is of very little weight. If I understood rightly, the plaintiff claims what is called toll traverse, and also a market toll. Toll traverse is where a person, who is owner of land over which no right of way exists, may grant one on payment of a toll; and if it exists for many years the public acquires a right to the way, and the individual to the toll. This is the case with the Duke of Bedford as to Covent Garden Market. The declaration gives no notice of what is claimed, whether toll thorough or toll traverse. Toll thorough is where the party is under an obligation to do repairs, and it is not maintainable without; and there is no evidence here that the corporation are under any obligation to repair the streets of Northampton, and therefore there is no toll thorough in this case; and I contend that the town of Northampton

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has not established any evidence of a right to toll traverse. If there be any such right when did it begin? The evidence goes to shew that the property in the soil originally belonged to the crown, and was conveyed to the burgesses of Northampton for two hundred marks in the reign of Henry 2. But it is quite indifferent when it was conveyed; for I take it for granted it will be conceded that there were highways through Northampton before the burgesses had it. Now, a toll traverse cannot be after the ground is dedicated to the public. There is no account from the Pipe Rolls of any account rendered to the king from Northampton for tolls by the sheriff or any one else. In the reigns of Stephen and Henry 2, the borough was in the king, and the sheriff of Northamptonshire renders account; but there is no account of tolls, which, if there had been, the diligence of the other side would have found it: there is perquisite, &c., but no toll. The charter of Richard 1, grants certain franchises from the rights of the crown, and that all the inhabitants of Northampton be quit from toll and lastage from all places and ports of the sea; and adds, "we have granted to them the aforesaid *customs*." This word in ancient charters is of various significations; and where the context justifies, it may mean toll; but the word "aforesaid" in this case limits it to what had been previously mentioned. It goes on to say, "and all other liberties and free customs which our citizens of London had or have." This only means free usages, not bondage. I submit that it is no grant of toll; if they had the toll before then, the right to it could be confirmed, but it is not. The charter of 2 Hen. 3 is used to shew that there was a restoration: there is no mention of toll there, nor is there any evidence of any toll being collected while the town was in the king's hands; if there had been they would have produced it. Then as to the commission and return in the time of Richard 2, not one of the articles read from the return has any thing to do with the toll claimed. The tolls at a fair have

nothing to do with this cause; and there is not in the return any allusion to toll which will not be satisfied by toll at a fair. The words are—"were always used to give tolls for their merchandize sold and bought in this town." This means only toll at a fair, where in those early days goods were sold; but it does not describe toll traverse, which is not for selling and buying, but for passing through the town. Then the withdrawing what the king put on does not apply; and the case of the master of the hospital only applies to toll on goods bought and sold. Then as to the men of Preston, there is no mention of what the toll is; but you have no right to suppose it to be toll traverse, comparing it with what goes before. The very curious part of the document says, that the Earl of Cornwall and another person have withdrawn the toll at Billing Bridge, and in Salt Street. Now Billing Bridge is not in Northampton, therefore it is not toll traverse. I have read these to shew that toll traverse is not of necessity included, and is in most instances expressly excluded; all the toll the document shews is a toll on goods bought and sold, as to the rest it is not ambiguous, but totally silent. This return professes to be a return of all sorts of things which the king and the burgesses claim: the words are—"They say that the burgesses of the town and borough of Northampton have therein courts, pillories, gallows, &c., and this by the grant of the lord the king, and all his ancestors from the time of our lord the king Henry the Elder." Would not toll traverse have been included here if it had existed? This is pregnant evidence that it did not exist at that time. Then, in the charter of Hen. 7, no mention is made of toll traverse; the Crown indeed could not grant toll traverse after a grant to the corporation of the land with a highway. I will shew that no toll passed by this very charter; it was decided thus in Cro. Eliz. part 2. Then the charter of 41 Eliz. contains no allusion to toll traverse, nor any statement from which it can be

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inferred that it existed. But it shews what they paid the rent for; that they had these lands in and near Northampton by various charters; it only confirms land, not all lands and all tolls. There are only the general words at the end which are in every charter, confirming only what they had before, not granting any thing new. The charter of Hen. 6, I pass by. Then comes the exemplification of a judgment in the reign of Geo. 2. It only shews that they possessed the land. By *Rex v. Miller*, on a quo warranto, the corporation lost their privileges; and on their petition the charter of 36 Geo. 3 renewed them, in consequence of their dissolution. It granted nothing new, it was only a revival of an old market, and not the creation of a new, and the king could not give a toll in an old market, which was without it. The first document as to tolls is in 1765. It is admitted that the corporation have books from the time of Edward 6, and from Elizabeth's time they have regular journals. If they had these tolls, who collected them? Bailiffs? Where are the entries? It was not lessees, for they have not a single lease anterior to 1765. I never knew such a case so supported. Mr. Jeyes admitted that there was not a single entry as to toll traverse. This of itself puts an end to the case. The accounts of the treasurer entered in a book contain no entry of any receipt of tolls. It is conclusive proof that in 1765, or just before, this usurpation of tolls commenced. It was an usurpation, not ripe till then for a lease; or there would have been an entry of the appointment of collectors. The first lessee was one of their own aldermen, and this shews that it originated in usurpation. The recitals in the lease are no evidence. There is an extraordinary one, as if the tolls had been actually conveyed to the dean and canons of Windsor by the king. It is a very cunning recital; the fact is, that it was part of the fee-farm rent, and not of the tolls. It is a false recital, made to create evidence, which, if it had occurred 100 years before, might have been thought something of.

Then they do not shew any thing after the seven years' lease of Gibson expired till an agreement by the mayor in 1799. Now, if the tolls were worth 87*l.* in 1767, would not the value have been much increased in 1799, on account of the increase of trade? Yet in 1799 they were let at 76*l.*, and 7*l.* for the bailiff. If the majority of persons had paid the tolls, they would have been doubled by that time. The instances of payment they have proved are of persons who went only four or five, or at most ten times in a year, and it was not worth any person's while to resist to any extent. But what refusals there were prevented the increase. From 1782 to 1811 no treasurer's accounts are produced. The last rent was 65*l.* It grew into a serious usage after twenty years. Cook paid 210*l.* in 1820, and the present man pays 220*l.*; and if you find your verdict for the tolls to-day they will let at 400*l.* or 500*l.* a year; for I shall shew that many of the sums which were paid were very small. Pickford's was only 17*s.* 4*d.* a year; and unless people joined to resist the toll might go on. Nothing is more easy than to establish such a toll. The collector takes the toll from those who will pay, and those who will not he at first lets go without, till it grows large enough for an action, and then the corporation bring it. Now what is the toll? Ought not a toll to be certain? If the toll was collected of two hundred weight, would there not have been a weighing machine? It is not reasonable to have the same toll for two hundred weight and two tons. But it is not confined to two hundred weight. Mrs. George says she took toll if there was any luggage. Is this uniform? Is it consistent? It wants that essential ingredient of certainty to give it a legal existence. There is no entry in any ancient book—no schedule till the year 1811. That claims for a covered waggon two-pence, and for wheels shod with iron two-pence. There is no proof of this. The collectors also each go by a different rule. I will open now very shortly my evidence on the part of the defendant. I shall shew by the oldest document in the country,

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Domesday Book, that Northampton was an ancient town in the time of the Conqueror and of Edward the Confessor, and that there was a highway to the north, and no toll. If I do this there is an end of my friend's case as to toll traverse. In William the Conqueror's time, mentioning different properties, it says, "the King hath the soke." "The burgesses of Anton (Northampton) render 3s. 8d. for their houses to the king in fee farm." In many parts of Domesday tolls are mentioned, but none as to Northampton. If toll traverse did not exist then, it cannot now. The town of Coventry was then in existence on the other side of Northampton, and it was a populous place, and must have had a highway there without toll; for if toll had been claimed it would have been mentioned in Domesday. Then I shall produce a grant of king John (pretty much in the same terms as king Richard's charter), which says, that they shall elect a reeve, who is to account to the king; and no mention is made of a mayor at all. This charter does not contain a word of any tolls granted. Then I shall shew temporary grants for murage, pontage, and paving, inconsistent with the toll now set up, viz. that they might take of every cart taking goods of Northampton to be sold a halfpenny, of the cart of a person without Northampton a penny, &c.; but these were to cease at the end of three years. If they had a toll traverse before, would it not have been referred to? I do not say this is a conclusive argument, but in such a case it is an argument worthy of consideration. There are also three acts of Parliament, passed previous to the year 1814, for paving the streets of Northampton, in which there is a reservation of the Pomfret Toll, but not of the toll traverse for the town. But in the year 1814 they had got, as they thought, strong enough on their claim to get a clause introduced into an act passed to amend those acts, which clause contained a reservation of the toll. I shall shew, with respect to the toll itself, that some refused to pay, and others paid only a smaller sum, as a penny in-

stead of twopence. One man who owed as much as 1*l.* 5*s.* was let off on paying 1*s.* 6*d.* This was while the usurpation was growing. A few instances of resistance acquiesced in by the corporation are worth a hundred instances of persons acquiescing in the demand, because the smallness of the toll, and the inconvenience of being detained, would prevent their resisting, and induce them to pay. These observations apply to the toll traverse.

With respect to the market toll:—Toll on cattle and goods sold is not incidental to a market. It may be granted with the market originally by the crown; but if it is not the party must be content with pickage and stallage only. This is shewn by the case of *Heddy v. Wheelhouse* (a), which was an action of trespass in which the defendant justified the taking as being for toll in a fair; but the law is the same, whether in a fair or a market. The Court were of opinion that the toll was not granted under the general words of the charter of Hen. 7, as to a fair. The words of the charter of Elizabeth, which was obtained a few years after this decision (probably on account of the uncertainty of the evidence) only amount to a general grant of what they before had:—"And moreover we grant and confirm to the mayor, bailiff, and burgesses of the town of Northampton, that they may and may be able to have and hold as they have heretofore been accustomed to have and hold a free market on every Wednesday, Friday, and Saturday, with tolls," &c. On this I say it was not a new grant of a market, and the king cannot add a toll to an old market. In point of fact they only hold it on the Saturday. As to Daintree, it only means such tolls as were taken at Daintree at the time of the charter; it does not shew when it commenced to be taken at Daintree. I shall shew, that, before the year 1796, no beasts were sold in the market mentioned in the charter obtained in that year, and that for long after no toll was paid for them. The words of that charter amount only to a con-

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(a) Cro. Eliz. 558, 591.

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firmation. It, like that of Elizabeth, recognises an existing market, and is not a grant of a new one ; therefore, no other toll was claimable than that which existed before. Then let us see what toll existed before. I shall shew by many witnesses that no toll was paid before the year 1800. Then as to the advertisement in the paper in Holt's mayoralty, signed by the mayor in 1802, it was not till seven or eight years after that the toll was demanded on beasts sold in the market. The evidence on this subject is very slight. Some paid, but the majority resisted. The main part of the evidence applies to the fair days. As to the butchers, they were not exempted by any custom ; but when a sheepskin was seized for toll they met and combined to defend themselves, and gave notice to the collector, and it was given up, and butchers now load in Northampton, and send up meat to London, and have not paid since ; and they are a large class of persons. The toll on corn at first was taken in kind—a bowl of corn out of each sack. Now, if this was the right which they originally had they could not change it into a twopenny toll. The case on the part of the plaintiff is a most flimsy case, and for a corporation it is a case full of suspicion, not supported by documents or satisfactory evidence of payment, while the defendant's case is decisive, as founded upon the successful resistance made to the claim.

A witness was called to produce extracts in English from Domesday Book. He stated, that he had made his translation from a printed copy of the book in the original language, and had compared his translation with the original, but he had not any examined copy taken from and compared by him with the original book.

Wilde, Serjt., submitted that a copy of the original should be produced, in order that the Court might judge of the meaning.

Sir J. Scarlett.—It is an objection *inter apices juris*.

Wilde, Serjt., then consented to admit a printed copy of the book, which was sent for, and the extracts were read by the witness, *de bene esse*. They turned out to be correct:—

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1. A passage was then read as follows:—"Lewellyn received toll of salt that came to the manor-house."

2. "Leston in Bedfordshire. The toll of the market is worth 7*l*."

"Northwhite in Cheshire. Whosoever from another fair bringeth away a wain with two or more oxen giveth for toll fourpence."

"Burton and Ferriday in Lincolnshire. The men of, take other toll than they took in the time of King Edward."—"Castel they do likewise."

The charter of King John was read, and two grants to the town of Northampton of murage were read. One was in 9 Hen. 3, for three years, and the other in 36 Hen. 3, for two years only. Grants of toll for pontage and pavage for limited periods were also put in; also three acts of Parliament of the 18, 37, & 54 Geo. 3, for paving, watching, and lighting the town of Northampton, in which there was a proviso that nothing therein should affect the tolls payable to the Earl of Pomfret. The witness who produced the examined translation of the grants of murage, &c., stated, on his cross-examination by *Wilde*, Serjt., for the plaintiff, that grants in aid were made to many towns in the kingdom, and that he did not recollect ever seeing one which contained any exception of existing tolls.

A presentment of the 3 Edw. 3 was read from a Record Roll of the Pleas of the Crown before the Justices in eyre, reciting several cases of extortion in the taking of toll. On the cross-examination of the witness who produced it, it came out that there was one roll made up for

The defendant
 in evidence
 read a part of a
 Record Roll

of presentments before Justices in eyre, and it appearing that there was one roll for each hundred, and that reference was made in one part to another part of the same roll, it was held that the plaintiff was entitled to have read such parts as he thought proper.

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each hundred, and that another part of the roll, which contained the above presentment, contained another presentment relating to the town of Northampton, which *Wilde*, Serjt., for the plaintiff, wished to have read.

Sir *J. Scarlett*, and *Jones*, Serjt., objected.—It is a distinct matter; it is like different indictments.

Wilde, Serjt.—There is but one roll for every hundred. The presentments] are made under the same authority, and returned at the same time and in the same manner; and the entry read relates to the town of Northampton, and I have a right to the whole of the roll. It is returned on the same document, and may affect the other parts by explanation. The part produced is only garbled without it. In the part introduced are the words—"After which came the defendants, and made fine, as appears amongst the presentments of Northampton."

N. R. Clark, same side.—Without the reference it does not appear for what they made fine. It is like a declaration without a plea, or an indictment without further proceedings.

The witness stated that the presentments came all consecutively.

TINDAL, C. J.—It seems to me that I must take this as one indictment (for a presentment is an indictment) against these four persons, and that they appeared. Their appearance is stated as of another term, but still the record is made up distinctly on the subject.

A witness was then called, who stated that sixty years ago there was no cattle market at Northampton, and that when he occasionally took a few sheep there he did not pay any toll for them.

Another witness, a butcher, stated that he had known the market since 1778, and that there was "none to speak of;" that he saw country butchers come in carts to the market, but never saw them pay any toll; that on the 13th of January, 1831, toll was demanded of his man, and a skin taken by the collector in default of payment, but, in consequence of a determination of the butchers generally to resist the payment, the collector came and paid the value of the skin to him. The witness added that toll had not been demanded of him since, but stated that he had a stall in the market, for which he paid the corporation two guineas a year.

Another witness, a butcher, living eight miles from Northampton, was called; but on his stating that he had refused about a year previous to pay toll, and had not paid it since—

Wilde, Serjt., objected that he was not a competent witness, as the verdict, if the plaintiff succeeded, might be used as evidence against him. He cited the case of the *Earl of Falmouth v. George (a)*.

Sir J. Scarlett.—It seems to me that the objection is equally valid against all the king's subjects, as the claim is against all. It is too general, as all may have occasion to pass through.

TINDAL, C. J.—It only goes to exclude those who have

(a) 2 Moore & Payne, 457. In that case the plaintiff claimed a right under a custom to take the second best fish out of every boat-load frequenting and landing fish at a certain cove, at which the plaintiff and his ancestors maintained a capstan and rope for their use in stormy weather. And it was held that a fisherman fre-

quenting the cove was not a competent witness to disprove the existence of the custom, as he had an immediate interest in the event of the suit; for, if the defendant obtained a verdict, the witness would be protected from the consequences of the non-payment of the tolls by himself.

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Persons who have refused to pay toll traverse or a market toll are competent witnesses, ex necessitate, for the defendant, in an action of debt by the lessee of such tolls, to which the general issue is pleaded.

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refused to pay. My only difficulty is, that it is not the precise issue.

Sir *J. Scarlett*.—This verdict could not be evidence without other evidence by parol, to shew the ground of the resistance. It would very much shorten cases if such an objection were to prevail.

TINDAL, C. J.—That is what I feel at the moment. It might be that he had no cattle there. The form of action does not appear in *Lord Falmouth v. George*.

Wilde, Serjt.—It was debt, with a plea of nil debet; and the very same objection was taken; and the Court spoke (a) of the verdict *with other evidence* being admissible in an action against the witness. A case in Douglas was also referred to by them (b).

Jones, Serjt., for the defendant.—The rejection of a witness under such circumstances ought to be confined to cases where there was a special statement of the custom in the pleadings, and not applied to the common form of action, where the verdict might have proceeded upon a variety of grounds.

TINDAL, C. J.—I should have thought so. I will take a note that the witness was tendered; but I cannot receive the evidence with that case before me. I cannot say that he is competent. I think there is great weight in

(a) The Chief Justice, who pronounced the judgment of the Court, said (inter alia) "Although the declaration did not set out the custom, yet as the plaintiff claimed his right upon a custom, and the defence consisted in a denial of it, the judgment in this case, with evidence shewing that the

question at the trial was whether there was a custom or not, would be admissible, should an action be brought against the witness for landing fish without paying the toll."

(b) *The Company of Carpenters of Shrewsbury v. Hayward*, 1 Doug. 374.

the answer to the case, but sitting at Nisi Prius I cannot decide against it (a).

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Several old witnesses were then called; from whose evidence it appeared, that, at first, the toll for waggons laden with corn used to be taken with a bowl out of one of the sacks, and that afterwards a toll of two-pence was substituted, which many paid, but some refused. It also appeared that very few cattle indeed, according to the testimony of one witness—"an odd cow or two"—were sold in the market previous to the year 1802; and it was proved that at that time papers were printed by the mayor, stating that, at the request of the farmers and others, he appointed a market for beasts and sheep to be held on Saturday at certain places (specifying them), and about a month after this the number of cattle became very considerable.

It further appeared, that the toll of two-pence for waggons was not uniformly demanded of the non-freemen, and that though some freemen were charged half toll, some were allowed to pass without paying any at all.

Several witnesses, who had refused to pay the toll within such a time as that the right to claim it would not be barred by the Statute of Limitations, were rejected on the authority of *The Earl of Falmouth v. George*, according to the decision mentioned supra.

Wilde, Serjt., in reply.—Toll traverse is a reasonable toll. No man has a right to use my land without my consent; and if I give up the land for the benefit of the public, I may dictate the terms, and, with the authority of the crown by charter, may claim a reasonable compensation for the right of traversing over my land. One man may have

(c) The inclination of his Lordship's opinion in favour of receiving the witness, has been since confirmed on argument in the application for a new trial, which was granted on the ground of the rejection of the evidence. See 2 M. & Scott, 843. The argument was by special arrangement held before a majority of the 15 Judges.

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the toll and another the land, and it becomes necessary to shew then that the toll and the land belonged originally to the same person. This is illustrated in Lord *Falmouth's case*. The site of the town of Northampton was originally private property, either of the crown or some one else; and a right of way was granted over part of the soil for the consideration of a toll. As to the market toll, there is no answer to my case. It has been said, it is a new market; the witnesses proved it to be an old one. But it is no matter which. I did not produce the charter of Elizabeth to shew that no market existed before. No doubt these markets existed before time of legal memory. There was a grant of a fair in Hen. 7th's time, and a question arose on this. In that case the pleader only set out the charter of Hen. 7, thinking that the grant of a fair was enough in that charter alone, but the Court thought that was not enough. But in the following year, to get rid, perhaps, of doubts of evidence, a charter was granted by Queen Elizabeth, which grants them to hold as they heretofore held a free market, with toll, &c., and an authority to take and levy in all the said fairs, marts, and markets all such reasonable toll as is taken in any borough or town in the county of Northampton, or which they had taken themselves. It is said that it is not an ancient market for this kind of cattle. That does not matter; persons may bring what has not been brought before, and must pay. There is another charter of Geo. 3, which grants a market with toll. The pence for the few beasts which came before 1802 was not worth collecting. The alterations at that time were not for establishing a new market, but for putting the cattle in a new place. But this was not acted on. Once some cattle were put there near a window, but complaint was made, and the cattle were removed to the old place. The collection began when it was worth while, and has been continued ever since. No alteration has taken place in the toll. It is an ancient market. How can we prove this in the absence of documents, except by

witnesses? and with them I have gone back as far as fifty years, which is as far as one can well go. The market toll has always been demanded, and under the charter is clearly payable.

Now, as to the toll traverse. Many of the lands of the crown were let out to farm, and Northampton was very early in that situation. I have shewn this from the year 1140. I have shewn, that, as early as Hen. 2nd's time, it was farmed by the burgesses of Northampton. The corporation are the lords of the manor, and hold courts; and have in some leases a reservation of services to them as lords in chief. The terms in the charter of Richard are sufficient to pass the whole which the crown had. The charter of John is in fact the same as that of Rich. 1. The charter of Hen. 2 speaks of the waste. I read presentments about both tolls—one of them is, "Simon de Brightwell, in the king's highway, which is called Salt Street, and the Lord Roger de Montfort, at the bridge of Billing, have withdrawn from the lord the king and the bailiffs of Northampton the customs and tolls which the lord the king and his bailiffs and burgesses of Northampton have at all times been accustomed to receive and have there," &c. This shews that these two great men had withdrawn or withheld this toll from the corporation of Northampton. This makes out a highway toll—a passage toll payable at that time. The part of the presentment which my friend relies on was confined to royal liberties, and such like. In the charter of Elizabeth, the grant of the land is accompanied by the words "tolls, customs, privileges." This cannot be market tolls, for they are mentioned farther on. I have proved by an old man of near ninety that he had heard his father say that he always paid the two-pence. My friend says, that they take toll for two hundred weight and upwards, and yet they have no weighing machines. The toll is payable for a loaded cart; but the corporation, to prevent question as to what is a loaded cart, have said

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to their collectors, "Do not take toll under two hundred weight." Then it is said there is no toll-gate; but that shews that it was not payable at any particular place, and it would not be worth while to have collectors and gates all over the town. These arguments are both against my friend. A toll cannot be created now—it would be impossible. Old witnesses would have heard of the commencement, if it had any, in modern times. A lease has been shewn of the tolls from 1765. The tolls were always appropriated to the payment of the fee-farm rent. Disputes did take place, and a halter was distrained by the collector. Domesday records, "Received of Northampton 30*l.* 10*s.*; this pertains to the farm of the town." As to the grants in aid, they are in the usual way. As to the act of Parliament, it is for making a rate upon the houses. There is a reason why Lord Pomfret should be mentioned, that is, that the old bridge was to be taken down. This would not affect the corporation, and it was therefore unnecessary to put in any exception for them.

After the learned Serjeant had commented on the uncertainty of the defendant's parol evidence—

TINDAL, C. J. (in summing up) said—The question is whether at a very ancient time a toll was payable for the right of way over this particular place, because, this being a public highway, the law will not allow a toll without a consideration for it. If, before the toll was payable, the land belonged to the crown, and the crown granted it out to the public, that will be sufficient. The question will be, whether you think upon the evidence that a toll must have been originally taken by the crown, for if so you will find for the plaintiff; but if it was an usurpation since the time when the road was a public highway, dedicated to the public without any grant, or with a grant without any consideration, then you will find for the defendant. I

do not mean that there must be positive evidence, but you must look at the mode of enjoyment; and if you find that for a long series of years, as far back as human testimony can carry it, the toll has been taken, or that as much documentary evidence as could reasonably be expected has been produced, you may presume that the toll had a legal origin. You will have to say whether the establishment of the toll was of antiquity equal to the time when the soil of Northampton was in the hands of the crown. There is, on the part of the plaintiff, a considerable body of evidence to shew that the toll of two-pence has been paid at different parts of the town, but chiefly in the Bridge Street. It is said, on the part of the defendant, that the toll has not been certain. Now it is of great importance that it should be certain. You will consider, therefore, how far this affects the claim. If the corporation itself had varied the toll, it might be of importance; but it seems that it was the lessees who did it; and if you can see that it was a variation, not for the purpose of claiming more at one time than another, but for the purposes of convenience, and that convenience of both parties, it will not affect the plaintiff's right. The living testimony seems to carry the matter back to about seventy or eighty years ago. The only evidence of possession by the plaintiff is of leases from the year 1768, and the receipt of rent by the treasurer of the town from the year 1765. It is said, on the part of the defendant, that this is very slight evidence. It does not appear to me that the instances proved are very strong or very numerous. I confess that one might have expected more evidence from the archives of the corporation; but that is not to decide the matter, if you think the other evidence satisfactory. It is said, on the part of the defendant, that if the toll had been so long in the hands of the corporation, there would have been earlier entries, or leases, or accounts of bailiffs, accounting for the receipt by themselves or others. There is

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If the lessee of tolls under a corporation vary, by temporary agreement, the amount of toll claimed of individuals, it shall not affect the right to the tolls, if it appear to have been a variation, not for the purpose of claiming more at one time than another, but for the convenience of both parties.

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nothing to be answered to this, but that they have them not. The non-production of such evidence is not alone sufficient to counterbalance the other testimony in the case. You must look at the general complexion of the case. It appears that there are other accounts, but they have nothing to do with the toll. You will have to say whether you are satisfied that the soil was in the crown at the time when the toll was first payable, and that the toll was granted on the dedication of the highway to the public. It seems that as far back as the year 1140, which is before the time of legal memory, that an account was rendered to the crown for the borough, which shews that the soil was in the crown then, and till the year 1181. Then comes the charter of Richard 1, which grants what was previously let to farm. Then the charter of Hen. 3 grants the town in capite. Then, with respect to the presentment in the time of Ed. 1, the question is whether it applies to the toll in dispute. Then as to the defendant's evidence. On his part they begin by producing Domesday Book. And it is said, that if there had been a toll payable it would have appeared in Domesday. That book was composed about the year 1066. It is admitted that it is not mentioned there; but if the toll has originated before the first year of the reign of Rich. 1 it would be in time. Therefore, though it may not be mentioned in 1070 or 1080, yet if it was in existence before 1 Rich. 1 it would be in time. There are some instances of the mention of toll in Domesday, but they are very few. But it might not be a profit to the crown, as Northampton was farmed out, and the king would have the rent, and all subordinate profits would be received by the farmer. The charter of king John does not seem to carry it any further. Then with respect to the various grants in aid, it appears by the cross-examination of the witness who seems conversant with these matters, that it is not usual to mention the original tolls. It may be in aid of the town's then

resources without specifically mentioning them. The presentment of 3 Edw. 3 is a complaint of extortion in the bailiffs, and if that had been for taking the two-pence of carts it would have been very important. But you must see whether it in any way touches the present claim. It seems to apply to a toll at a fair, and not to a toll of the kind claimed here. Then as to the act of Parliament of 18 Geo. 3, and the other acts on the same subject, in which there is a proviso relating to Lord Pomfret's toll, it appears that he was more nearly connected with the subject matter than the corporation were. The question for you with respect to the tolls claimed is, whether there is reasonable evidence from which you may fairly suppose they had a legal origin. It is very difficult to establish a toll without some foundation, though toll may be claimed by usurpation. You will look back to the year 1768, and see whether resistance would not have been made then if there was no ground for demanding the toll. You will say whether you are satisfied that the ground was in the king, and the toll demanded at the time when the road first passed through Northampton; and if you think so, then you will find your verdict for the plaintiff for the sum of four-pence.

With respect to the market toll, supposing there was no market before the charter of Geo. 3, then the toll will be a good one, although the word "confirm" is used in the charter, because it might be introduced only in case it should be requisite. It is said that the king cannot grant a new toll in an old market. But in this case you must be satisfied that there was a market of which the public was in the full enjoyment, without paying any toll, before this matter can come into question; but there does not seem any evidence of that. If there was an old market, at which the toll was received, there is an end of the question that way; and if there was not, then the charter of Geo. 3 grants a new one, which is good for a reasonable

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toll, according to those paid in other places in the county.

Verdict for the plaintiff—Damages, one shilling.

Wilde, Serjt., *N. R. Clarke*, and *Chilton* for the plaintiff.

Sir J. Scarlett, *Jones*, Serjt., and *Addison*, for the defendant.

[Attornies—*Jeyes*, and *Vincent*.]

Adjourned Sittings in London after Trinity Term, 1834.

BEFORE LORD CHIEF JUSTICE TINDAL.

June 26th.

MARIN v. PALMER, Esq.

In assumpsit by indorsee against acceptor of an English bill of exchange, to shew that the plaintiff had received the bill when it was over due; a protest, which had been made of it by the plaintiff's immediate indorser, being in the hands of the plaintiff, was called for by the defendant at the trial on notice to produce. On its production

ASSUMPSIT on a bill of exchange, dated September 18, 1832, for 1000*l.*, at nine months from the date, drawn by one Caley on and accepted by the defendant, indorsed by Caley to L. Goldsmid, by Goldsmid to one Meyniac, and by Meyniac to the plaintiff.

After the formal proof of handwriting on the part of the plaintiff—

Storks, Serjt., for the defendant, stated that no value had been received by the defendant for the bill, but that being in want of money he accepted this bill and several others for the purpose of raising it, but that one of the parties concerned in the negotiation pledged the bill in

it appeared to be attested by a subscribing witness:—*Held*, that the mere circumstance that the protest came out of the hands of the plaintiff, as he did not claim title under it, was not sufficient to dispense with the necessity of calling the subscribing witness; but it being proved that on two occasions the paper had been produced by the plaintiff's attorney to the defendant's attorney, as the protest applying to the bill in question, it was admitted in evidence without proof of the attestation.

question, without any authority, for a sum of 50*l.*, which he applied to his own purposes. He further stated, that Meyniac, the person who indorsed the bill to the plaintiff, had protested it some weeks after it became due, and therefore the plaintiff, receiving it when over due, took it subject to every infirmity to which it was subject in the hands of Meyniac.

The protest was put in by the plaintiff's attorney, in consequence of a notice to produce. It appeared to have been attested by a subscribing witness.

Merewether, Serjt., for the plaintiff, submitted that it must be proved in the regular way.

Storks, Serjt., for the defendant, contended that the subscribing witness need not be called, as the instrument came out of the custody of the opposite party.

TINDAL, C. J.—It is not a foreign bill. It does not require a protest. Suppose you give a man notice to produce a deed, unless he claims under that deed, you must call the subscribing witness.

Storks, Serjt., then called the defendant's attorney, who stated that on two occasions the plaintiff's attorney produced the instrument in question as the protest applying to the bill.

Merewether, Serjt., still urged his objection to the reading of the protest.

TINDAL, C. J.—The case does not stand now as it did. Here is an admission by the attorney in the cause.

Merewether, Serjt.—The admission does not carry it any farther than the other evidence. There was no admission that all had been done rightly. It might not, as

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far as the attorney could tell, be a legal protest, as it was made not by the plaintiff, but by a third party.

C. Cresswell, on the same side.—It must be shewn that the party was the holder of the bill at the time, consistently with the case of *Barough v. White (a)*. It is merely a declaration of the party, and is not receivable unless he was the holder at the time when it was made. The Court of King's Bench last term confirmed that case, but refused to carry the doctrine any further. It was in a case of the sale of an estate. It is no more than if a letter of Meyniac's had been shewn, which would not be evidence without proof that Meyniac was the holder of the bill at the time; otherwise a party might be bound by the declarations of one having no interest in the matter.

TINDAL, C. J.—It appears to me to stand upon the peculiar circumstances of the case. There was an understanding between the two attorneys. On two occasions the paper was produced as the protest of this bill, and I think that supersedes the necessity of proving it by calling the subscribing witness.

The bill became due on the 21st of June, 1833, and the protest was dated 12th of July, 1833.

It appeared from the evidence of a person named Levi, who described himself as a general dealer in bills, that the bill in question was accepted, together with others, for the purpose of raising money for the use of the defendant; that the defendant did not receive any money at all upon the bill in question; that he the witness held it till two or three months before it became due, when he gave it to his brother who was going to America, to raise upon it a sum of 50*l.*, which he obtained from a person named Lewis, since dead; that Lewis was frequently applied to, to give

(a) 4 B. & C. 325; 6 D. & R. 379; 2 C. & P. 8.

up the bill, but would not. On his cross-examination he stated, that although the defendant received no money upon this particular bill, yet he had handed him over, since the month of August, 1832, monies amounting altogether to between three and four thousand pounds.

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TINDAL, C. J., to the plaintiff's counsel.—As it stands at present the defendant has been defrauded of this bill. It is for you, therefore, to shew that Meyniac gave consideration for it.

A witness was then called, who stated that Lewis gave him the bill in question, accompanied by the following letter, in the defendant's hand-writing:—"The bill drawn by Caley, dated Sept. 18, 1832, at nine months, for 1000*l.*, is my acceptance, and will be paid." That a few days after this he saw Meyniac, who was recommended to him by Goldsmid, to whom he had previously offered the bill, and Meyniac agreed to give wine for the bill, and transferred to him at the docks 240 dozen of white hermitage, which he transferred to Lewis; and the wines were handed over to Lewis's possession. The witness added that he was not acquainted with the value of wines, but that he sold three dozen to a friend, at 30*s.* a dozen.

TINDAL, C. J.—Have you the warrants or the books of the dock company to shew that all this really passed?

Meyniac was then called, and stated that he was a wine grower in France, and Marin, the plaintiff, also; that Marin resided near Bordeaux, at which place the defendant had an estate; that he had dealt with the defendant's house before; that he gave the wine for the bill, in consequence of the defendant's letter being shewn him, and that it was worth four guineas a dozen at the least; that after he had given the wine he handed the bill over to Goldsmid to cash, who kept it till after it was due, and then re-

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turned it with his indorsement on it to the witness for the purpose of having it protested; that he the witness handed it over to the plaintiff, who gave him full value for it.

Storks, Serjt., relied on the absence of Lionel Goldsmid, and the non-production of evidence from the dock company's books, as throwing discredit upon the account of the transfer of the bill to Meyniac.

Mercwether, Serjt., replied.

TINDAL, C. J., left it to the jury to say whether the bill had been obtained bonâ fide or not.

The jury inquired whether they must give a verdict for the whole amount of the bill.

TINDAL, C. J., told them they must give a verdict for what they thought was given by Meyniac as the consideration for the bill, and that would depend upon their opinion as to the value of the wine.

The jury found for the plaintiff, damages 50*l.*, being at the rate of two guineas a dozen for the wine.

Mercwether, Serjt., and *C. Creswell*, for the plaintiff.

Storks, Serjt., for the defendant.

[Attornies—*Sangster & Pugh*, and *Bozer*.]

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MURRAY v. MOUTRIE.

June 27th.

TRESPASS.—The declaration stated that the plaintiff was a seaman on board a whale ship, called the *Corsair*, of which the defendant was master, and that the defendant, on the 20th of June, 1831, assaulted and imprisoned him.

The defendant pleaded, first, not guilty, and, secondly, several special pleas, in which he justified the trespass, on the ground that the plaintiff was disobedient and mutinous, and therefore he moderately chastised him; and because he had previously stabbed a seaman named Chamberlain, he thought more than usual restraint was necessary to be put upon him. The plaintiff took issue on the plea of not guilty, and to the special pleas replied excess, upon which issue was joined.

It appeared from the evidence of the plaintiff's witnesses that he was cutting up blubber off the coast of Japan, and the defendant told him to cut it thinner; that the plaintiff said he could not, that he cut it as thin as any other man in the ship, and yet the captain was always grumbling at him; that upon this the captain abused him, and laid hold of his collar, upon which there were more words, and the chief mate struck the plaintiff; that he then threw down his knife, and said he would not do any more work in a ship where he was so ill-treated; that he went down below, and the captain and mate followed him, and brought him up, and put handcuffs on him, and he was a few hours after taken down into the pantry, and confined there, with irons on his hands and feet, during the night, for nearly four months; that he was on deck walking about in the day-time with handcuffs only on; that at first he was kept on bread and water, and afterwards had two pounds of meat a week, the men's allowance being one pound a day each; that in November, 1831, he was taken ashore at Wahoo, in the South Seas, and was left there, after a communication between the captain and

It is the duty of the captain of a merchant vessel, in case of misconduct of one of the crew, previously to the infliction of punishment, to institute inquiry, with the assistance of others, and to have the result entered in the log.

A seaman employed in cutting blubber on board a whaler, in consequence of a quarrel with the captain, followed by a blow from the mate, threw down his knife, and refused to do any more work in the ship:—*Held*, that such conduct was an offence justifying moderate punishment; and that, although the punishment were excessive, yet, if the seaman, by some concession, might have put an end to it, and refused, he could not recover damages for the continuation of the punishment after such refusal.

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the English consul there. The witnesses stated, that at night he could only lie on his back, and could not turn round, and that a man died in a place adjoining the pantry, and the body became very offensive from the bites of cockroaches, and that the men were ordered not to speak to him, nor give him any of their provisions. It appeared that the plaintiff had in a fit of anger stabbed a man named Chamberlain several months before, for which he underwent the punishment of cobbing, which punishment the plaintiff's witnesses said was suggested by the defendant, but this was denied by the defendant's witnesses.

The witnesses for the defendant also proved that it was understood that no flogging was allowed on board, and that putting in irons was the only punishment which could be resorted to. Several of the crew also swore that they remonstrated with the plaintiff, and asked him to return to his duty, thinking it a shame that he should be idle while they were working night and day; but that he said, he would be damned if he did any more work on board the ship. It was also proved that the captain himself had several times told the plaintiff he might have the irons taken off if he would promise to return to his duty, but he refused, and that he employed his time in reading novels and old newspapers, which were lent him by one of the crew. It appeared also that there was not any British consul to be met with till they came to the place at which he was sent ashore. The ship's log was put in, but it only contained three entries—one as to the commencement of the transaction, one as to the diminution of his allowance, and one as to his refusing to take bread and water.

Wilde, Serjt., for the plaintiff.—If a man is to be seriously punished, inquiry should be instituted, and the result recorded in the log. In the present case it is in the plaintiff's favour that so small a portion is entered in the log, for, if such things as are said to have happened had taken place, they would have been entered. On the

state of this record it is admitted that the defendant might at first have inflicted some punishment for misconduct, but it is alleged that the punishment was continued improperly. As to the cobbing, if the captain did not propose or take part in it, he ought to have been present to see that it was not excessive. The plaintiff is entitled to damages for the suffering he has undergone, and also for being prevented from sharing in the profits of the venture.

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TINDAL, C. J., in summing up, said—The question for your consideration will be, whether, under the circumstances, any thing which the captain did to the plaintiff exceeded the just measure of punishment. If it did, you must find your verdict for the plaintiff; if it did not, then you will find for the defendant, for, in point of law, he will be justified. By the common law a similar power of moderate chastisement is given to the captain of a ship as there is to a parent and a schoolmaster. The late Lord Tenterden often observed, that it was always desirable, and indeed the duty of the captain, to institute an inquiry, and have it entered on the log what the result was. It seems to me that it is undoubtedly both his duty and his interest. It is his duty, because, by availing himself of the advice of others, he prevents himself from acting solely on his own feelings, which may be excited; and it is his interest, because it furnishes evidence in his favour to be used on the day of trial. And it is matter of regret that a course which is so simple and so useful has not been resorted to in the present case. There are two points for consideration, first, what was the offence committed, and, secondly, what was the punishment inflicted. I have no hesitation in saying, that the plaintiff's throwing down the knife, and refusing to work, was an offence and a breach of the articles; and, if the rest of the crew had done the same, it would have wholly destroyed the venture, and the captain had certainly a right, for the sake of example, to

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inflict a moderate and proportionate punishment. There is some doubt, on the evidence, as to whether the plaintiff was kept in close confinement for the first ten or twelve days, or had temporary relaxation; but it seems that handcuffs were kept on the whole time, from the 26th of June to November, when they arrived at Wahoo. It does not seem that the offence committed was one likely to affect the existence of order and discipline in the ship, by inducing others to follow his example. There is a considerable portion of the defendant's evidence, which, if you believe it, will go materially to reduce the damages, provided you think the punishment improper, and find your verdict for the plaintiff. You must apply your mind to say whether the plaintiff might have got out by making some concession. For, if so, he cannot claim compensation in damages for that which he might have prevented by his own conduct.

Talfourd, Serjt., for the defendant.—We put the refusals to return to work as continuous acts of disobedience, justifying a continuation of imprisonment.

TINDAL, C. J.—Is not that the way in which I have put it? I do not see how you can separate it. Every refusal would be knocking himself out of work, and not a ground for any damages.

Verdict for the plaintiff—damages 50*l*.

Wilde, Serjt., and *Comyn*, for the plaintiff.

Talfourd, Serjt., and *Hutchinson*, for the defendant.

[Attornies—*J. W. Howard*, and *Young & Desborough*.]

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July 4th.

CHALMERS v. SHACKELL and Others.

CASE.—The declaration, which consisted of only one count, after the usual averment of the plaintiff's good character, and an allegation that he had been convicted of forgery and pardoned, proceeded as follows :—" And whereas at a certain place called the Rotunda, situate in the county of Surrey, certain meetings for the promotion of sedition and blasphemy had been held." It then proceeded to allege that the defendants, on the 27th January, 1833, published in a certain newspaper called the John Bull, of and concerning the plaintiff, and of and concerning his said conviction and pardon, and of and concerning the said meetings at the said Rotunda, the following libel :—

" Verily the Whigs select choice subjects for the exercise of his Majesty's grace ! A few weeks since, the town was astonished at the respite from death of two men, who had been found *guilty* of a *murder* under circumstances of peculiar atrocity ; it was then suggested, that the respite was granted to court the favour of the mob-ocracy of Lambeth, as Lord Palmerston had then some intention of standing for that borough. In the Times of Friday is the following :

" From a Correspondent.—Mr. Chalmers, who was convicted of forgery at the sessions of May last at the Old Bailey, has received his Majesty's gracious pardon. The case was reserved by the Court over several sessions for the opinions of the Judges on various points of law, which were ultimately decided against him, and he was at length sentenced to be transported for life. Sentence having been passed, the case became fit to be recognised by the

In an action for libel, to support a plea of justification stating that the plaintiff had forged and uttered, knowing it to be forged, a certain bill of exchange, to justify a verdict for the defendant, the same evidence must be given as would be necessary to convict the plaintiff if he were on trial for those offences ; but if the evidence falls short of satisfying the jury that the strict legal offence was committed, they may take the facts proved into their consideration in estimating the damages.

If the declaration in case for a libel state, *inter alia*, that at a certain place certain meetings for the promotion of sedition and blasphemy had been held, and that the defendant published of and concerning the plaintiff, and of and concerning the other matters, and of and concerning the said meetings, a libel charging him among other things

with having taken the chair at the said place, but not saying any thing of the character of the meetings there, it will not be ground of nonsuit should the plaintiff at the trial fail to prove that the meetings were such as he described in his inducement.

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Secretary of State on the merits, and the result of the investigation is, that Mr. Chalmers has received a pardon under the Great Seal, discharging him from all the consequences of the verdict, and restoring him to the enjoyment of all his civil rights and privileges, the same as if the conviction had not taken place (a)."

"In the former case, the murderers were men of such notoriously bad characters, that the officers, when they heard of the deed, immediately proceeded to take them up on suspicion. In this case, *we know* that the crime of *forgery* was not *new* to Mr. Free Pardon Patrick Chalmers; and we think we can offer some reasons for this act of Whig liberal mercy.

"Mr. F. P. P. C. was, for some time previous to his incarceration on this charge, an *eminent* mob leader in a *small way*. He called a public meeting in Smithfield—he headed a deputation to the Lord Mayor, to call a meeting of the Livery, to petition for the *abolition of the punishment of Death for Forgery*—he often took the chair at *the Rotunda*, and he is or was the intimate friend of that much persecuted and respectable publisher of treason, Hetherington. *These* are surely *convincing* reasons that Mr. Patrick Chalmers is a fit subject for the mercy of the Sovereign. But if these should fail to convince, we have *one* still which must be unanswerable—the Political Union met, within these few weeks, to petition for this *man's pardon*, and he is *pardoned accordingly*!

The defendants pleaded, first, not guilty, and secondly, a special plea, which stated in substance that the plaintiff had been guilty of forging and of uttering, knowing it to be forged, the acceptance of his brother, Mr. David Chalmers, of Edinburgh, on a bill of exchange for £20l. (b).

(a) See the case of *Rex v. Chalmers*, ante, Vol. 5, p. 331.

(b) There were also special pleas, alleging particular instances in

which the plaintiff had acted as a mob leader, and attended seditious meetings, but no evidence was given upon them.

A witness was called on the part of the plaintiff, who stated on cross-examination that he had heard the plaintiff say he had been over at the Rotunda, but he had never been there himself, and did not know what meetings were held there.

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Spankie, Serjt., for the defendant, submitted that some evidence must be given by the plaintiff of the character of the meetings at the Rotunda, and that if it were not the plaintiff must be nonsuited.

TINDAL, C. J.—I think some evidence must be given. Very general evidence will do.

Stammers, for the plaintiff, applied to his Lordship to amend the declaration by striking out the allegation in question, which he submitted might be done without injury to the plaintiff's cause of action.

TINDAL, C. J.—I cannot do that. You say that the libel was published of and concerning the meetings.

A witness was then called, but he was not able to prove the nature of the meetings at the Rotunda.

TINDAL, C. J.—There is a case in which a libel was stated to have been published of a man in two trades (a),

(a) *Figgins v. Cogswell*, 3 M. & Selw. 369.—In that case the declaration alleged that the plaintiff was a carpenter and sworn appraiser, and that the defendant intending to injure him in his several trades as aforesaid, and to prevent persons from employing him in the way of his said several trades, in a certain discourse which he had of and concerning the plaintiff in

his aforesaid trade of a carpenter, spoke the words complained of. The plaintiff at the trial proved that he was a carpenter; but failed to prove that he was a sworn appraiser, and was in consequence nonsuited. But the Court, after argument, set aside the nonsuit, on the ground that it was "a partible allegation."

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and it was held that you might divide the allegation. This seems to come within the principle of that case. At all events, it comes so near to it that I shall not nonsuit; but I will reserve the point.

The evidence on the part of the defendants, in support of the justification with respect to the forgery, was in substance, that a bill of exchange for 220*l.*, drawn upon and purporting to be accepted by David Chalmers, of Edinburgh, payable at the house of the plaintiff in Lower Thames-street, was presented and dishonoured, in consequence of which the agents of the payee wrote to the supposed acceptor at Edinburgh, who was the plaintiff's brother, and received an answer from him stating that he never accepted any such bill, and they were wrong in applying to him. Upon which they sent for the plaintiff, and had repeated interviews with him, in which he did not at all explain the transaction, but only said that the bill would be retired, and that there must be some mistake.

It was also proved that various steps had been taken to procure the attendance of David Chalmers as a witness, and also to get him to submit to an examination on interrogatories, for which purpose a commission was actually issued, but both endeavours were unsuccessful.

TINDAL, C. J., in summing up, said—We cannot consider the plea in any other way, or on any other kind of evidence, than if we were trying the plaintiff for the offence alleged in it. If you find that the plaintiff has been guilty of this forgery, it will have some bearing upon the other parts of the case. It seems that there are some parts of the libel which are not answered by any evidence, such as the charges of being the leader of mobs, and of attending seditious meetings. But if the other part is true, it will go to lessen the character of the plaintiff, and to rebut the charge of malice on the part of the defendants. There is

no direct evidence of the forgery, or that the plaintiff's brother did not authorize the putting of his name upon the bill. It is said on the part of the defendants that the plaintiff's conduct was inconsistent with innocence, and shewed that he had feloniously uttered the bill with the forged acceptance upon it, knowing it to have been forged. Undoubtedly, it is evidence of a transaction of an unusual character; but the question is, whether it would not be going a step too far, in the absence of any direct evidence that the brother had never authorized any use of his name before, to pronounce the plaintiff guilty of that offence. If the defendants have proved to your satisfaction that the plaintiff was guilty of uttering the forged acceptance, that takes out of the case the whole substantial part of the charge. But you may still give your verdict for the plaintiff on the part which relates to the charge of being a mob leader, &c.

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His Lordship left it to the jury to say what damages the plaintiff was entitled to; and repeated, that although they should think it was not satisfactorily proved that the plaintiff had been guilty of the forgery, yet that the circumstances might be considered in mitigation of the damages.

Verdict for the plaintiff—damages 30*l.*, subject to a motion for a nonsuit on the point reserved.

Stammers for the plaintiff.

Spankie, Serjt., and *R. Alexander*, for the defendants.

Attornies—*Platts*, and *Hopkinson*.

IN the ensuing Michaelmas Term, *Spankie*, Serjt., moved pursuant to the leave given.—It is necessary that a party who has qualified by his inducement the nature of the libel should prove it, otherwise the libel has not the character which he attributes to it. The libel only speaks

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of the plaintiff's taking his seat at the Rotunda, which is saying nothing against him, as it might be a place of meeting for scientific purposes; and you charge him with no offence, unless you shew in your allegation the unlawful nature of the meetings at that place.

GASELEE, J.—Is there any innuendo as to the taking his seat at the Rotunda?

Spankie, Serjt.—The innuendos are, he [meaning the said plaintiff] often took the chair at the Rotunda [meaning the said meetings at the said Rotunda]. There was therefore a material failure of proof of the libel so described.

TINDAL, C. J.—The question is, whether there was not enough left; whether it was not divisible.

Spankie, Serjt.—The nature of my motion is two-fold. My first point is, that if there is only one count and one libel, the whole libel is characterized by the description in the inducement, and the party must prove it all, one part is so bound up with the other. My second point refers to incorrectness in the declaration. It is, that the innuendos add a new meaning, wholly unauthorized by the libel. An innuendo is only to explain, and cannot import any thing new into the libel. The innuendos in the present case are strained, and go far beyond any thing contained in the libel. To that part of the libel which says, "he headed a deputation to the Lord Mayor, to call a meeting of the Livery to petition for the abolition of the punishment of death for forgery," the innuendo is [meaning that the plaintiff might, if tried and convicted for the crime of forgery, escape the punishment of death.] To that part which says, "and he is or was the intimate friend of that much persecuted and respectable publisher of treason, Hetherington," the innuendo is [meaning that the plaintiff had been a publisher of treasonable doctrine]. This

innuendo goes to create a new charge not in the libel. The next innuendo is to the part, "The political union met within these few weeks to petition for this man's pardon, and he is pardoned accordingly;" [meaning that the said pardon of the said plaintiff had been obtained by the said political union, and not through the innocence of the said plaintiff]. This is rather a libel on the Secretary of State than on the plaintiff. The two first innuendos are clearly obnoxious to the rule that an innuendo must explain and cannot enlarge. The jury may have acted on these; and if they are allowed to do so, they may invent new libels, and impute them to the defendant. On this latter ground I submit that the judgment should be arrested.

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TINDAL, C. J., after consulting with the other Judges, said—As to the effect of the rule upon the first point for a nonsuit, we entertain considerable doubt on the authority of the cases which have been already decided. But as there are some of the matters urged in support of the motion in arrest of judgment, on which we should wish to hear a little more argument, we grant the rule generally.

In the course of the term, in consequence of an arrangement between the parties, the rule was made absolute by consent, without argument (*a*).

(*a*) According to the cases decided, it seems that, in point of law, the plaintiff would have been entitled to retain his verdict. As to the first point, with respect to the divisibility of the introductory allegations, in addition to the case of *Figgins v. Cogswell*, referred to at the trial, ante, p. 477, note (*a*), there are the following cases which appear to bear upon the question:

Lord Churchill v. Hunt, 2 B. & Ald. 685.—There the declaration stated that an accident had hap-

pened by the collision of two carriages, which took place *without any fault in the plaintiff*, but that the defendant published a libel of and concerning such accident, imputing it to misconduct in him. The plea in justification stated that the accident mentioned in the supposed libel was the same with that referred to in the introductory part of the declaration; and it then stated that *the said accident happened by two carriages coming together, and by the plaintiff's mis-*

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conduct. The jury having found for the defendant on the justification, but for the plaintiff as to a part of the libel not justified (relating to a circumstance connected with the accident), it was contended that the verdict upon the justification was in effect a finding that the defendant had not published a libel concerning the accident mentioned in the declaration, and that such accident as there mentioned had not in fact occurred, it being described in the pleadings as an accident resulting from a *collision of carriages without default in the plaintiff*. The Court, however, held that *the collision*, and *the absence of fault in the plaintiff*, might be considered as two independent propositions, and that the jury by finding in favour of the justification had negatived the last and not the first.

In *May v. Brown*, 3 B. & C. 113, the declaration stated that *the plaintiff was an attorney*, and had been employed as *vestry clerk* in the parish of A., and that whilst he was such vestry clerk certain prosecutions were carried on against B. for certain misdemeanors; and in furtherance of such proceedings, and to bring the same to a successful issue, certain sums of money belonging to the parishioners were appropriated and applied to the discharge of the expenses incurred on account of such proceedings; and that the defendant, intending to injure the plaintiff in his profession of an attorney, and to cause him to be esteemed a fraudulent practiser in his said profession, and in his office of vestry clerk, and to cause it to

be suspected that the plaintiff had fraudulently applied money belonging to the parishioners, falsely and maliciously published *of and concerning the plaintiff*, and *of and concerning his conduct in his office of vestry clerk*, and *of and concerning the matters aforesaid*, a libel, &c. It was held that the allegation, that the libel was published "*of and concerning the matters aforesaid*," did not make it necessary to prove precisely that the libel did relate to every part of the matter previously stated. And Lord Tenterden, then L. C. J. Abbott, said—I think that the plaintiff did prove so much of his allegation as was necessary to maintain his action, notwithstanding the reference to introductory matter by means of the words "*of and concerning*," which occurs in the subsequent part of the allegation.

In *Lewis v. Walter*, 3 B. & C. 138, n. the declaration stated that the plaintiff was an attorney, and that the defendant, intending to injure him in his good name, and in his said profession of an attorney, published a libel of and concerning the plaintiff, and of and concerning him in his said profession. At the trial the plaintiff failed in proving that at the time of the publication of the libel he was an attorney. And it was held that this was not a fatal variance between the allegation and the proof; the words of the libel being actionable, although not used with reference to the professional character of the plaintiff.

See also *Rex v. Horne*, Cowp. 672; *Teesdale v. Clement*, 1 Chitty

Rep. 603; *Sellers v. Killew*, 7 D. & R. 121, and *Rutherford v. Evans*, 4 C. & P. 74.

On the second point as to the effect of the innuendoes, it appears from the following cases that a bad innuendo may be rejected as surplusage:—

In *Roberts v. Camden*, 9 East, 93, which was an action for slander, imputing perjury to the plaintiff, the words were, “He [meaning the plaintiff] is under a charge of a prosecution for perjury. G. Williams [meaning one G. Williams, an attorney,] had the Attorney-General’s directions [meaning the directions of his Majesty’s Attorney-General for the county palatine of Chester] to prosecute [meaning to prosecute the plaintiff] for perjury. The innuendo as to the Attorney-General of Chester was objected to as introducing new matter. Lord Ellenborough, C. J., said—We think there is nothing in this last objection; for, admitting most clearly that new matter cannot be introduced by an innuendo, but that it must be brought upon the record in another way, when necessary to support the action, yet where such new matter is not as here necessary to support the action, *an innuendo, without any colloquium, may well be rejected as surplusage*, as it can have no effect in enlarging the sense of the words used.

And in *Harvey v. French*, 2 Moore & Scott, 591, and 1 Cr. & Mee. 1, the libellous words were—

“Threatening letters. The grand jury have returned a true bill against a gentleman of some property, named French;” and the innuendo went on to allege that it meant to insinuate that the plaintiff had sent an unsigned letter to one T., threatening to kill and murder the said T., with a view and intent to extort:—Held that such innuendo, as carrying the meaning far beyond the import of the terms of the libel, was bad; but that as the words must be understood in their ordinary sense, and could not be read otherwise than as meaning that the grand jury had found a true bill against the plaintiff for sending threatening letters, the counts might be sustained, *rejecting the innuendo as surplusage*.

In 2 Wms. Saunders, 171 c, it is laid down, that, if an action be brought for speaking words all at one time, that is, all in one count, and there is a verdict for the plaintiff, though some of the words will not maintain the action, yet, if any of the words will, the damages may be given entirely; for, it shall be intended that the damages were given for the words which are actionable, and that the others were inserted only for aggravation.

And in *Lloyd v. Morris*, Willes Rep. 443, it is said, “We would take it that the jury only gave damages for such part of the words as were actionable, and that the Judge directed them so to do.”

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Seemle that it is necessary that goods seized under a distress for rent should be appraised by two sworn appraisers, under 2 W. & M. sess. 1, c. 5, s. 2, notwithstanding the schedule of the stat. 57 Geo. 3, c. 93, directs that for an appraisement under 20l., whether "by one broker or more," shall be charged only 6d. in the pound on the value of the goods.

If the tenant, to save expense, requests that appraisers may not be called in, and in consequence the broker who made the seizure values the goods, the tenant cannot, in an action, complain of that which was done as an irregularity.

If goods are removed by the landlord, which were not taken originally under the distress, nor included in the inventory, because they were not discovered at the time, the tenant may maintain trover for them.

BISHOP v. BRYANT and Others.

THE declaration contained various counts. The first stated that the defendants, on the 19th April, 1833, seized and distrained the goods of the plaintiff, under colour of a distress for rent, and retained possession for five days, and then quitted and abandoned their possession and the distress; and that afterwards, although the first distress could have satisfied the demands, they wrongfully and vexatiously made a second distress for the same identical arrears of rent, and kept the goods for five days, and then unlawfully converted them to their own use. The second count was for not removing after the five days. There was an allegation, that, by the grievances in the first and second counts mentioned, the plaintiff was hindered from carrying on his business of a pipe manufacturer in as large, ample, and beneficial a manner as he otherwise would, and was otherwise greatly injured and damnified. The third count was for not giving notice where the goods were removed to. The fourth was for not causing them to be appraised by two sworn appraisers. The fifth was for carelessly, negligently, and improperly conducting the distress; and the sixth was in trover. The defendants were Bryant, the landlord, who suffered judgment by default, and a person named Chuck, a broker, and two of his sons, who all pleaded the general issue.

The plaintiff carried on the business of a pipe maker; and it appeared from the evidence of the witnesses in his behalf, that in April, 1833, a distress was put in for a quarter's rent, being 10l., by the three Chucks, who left a man named Chassey in possession; that on the sixth day after, all three came again, and the plaintiff was asked by Chuck, senior, to pay his expenses, which he did, and then they went away, and Chassey went too, and remained away all night. That the next day the Chucks came again, accompanied by two others, and asked where Chassey was—if

he was out of possession—and went and fetched him; and all began to remove the goods; that there were not any appraisers there, nor any constable, before the removal of the goods; that they took away grates and every thing, and so negligently handled the pipes that a great many were broken. It was also proved by a son of the plaintiff, that he made several applications at the house of Chuck, the broker, for a copy of the condemnation, but could not obtain any satisfactory answer from either of them on the subject. It further appeared, that, after the distress and delivery of the inventory, they found a cupboard in which were a quantity of pipes, a sofa bedstead, an electrifying machine, and a model of a ship, all of which they removed.

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TINDAL, C. J.—If these goods which were taken from the cupboard were not included in the original distress, an action of trover will lie for them. It is not pretended they were included in the inventory, because it was not known at the time that they were there.

Talfourd, Serjt., stated that he appeared for Chuck the elder, and that Mr. *Kelly* was counsel, and would address the jury, for the other two.

TINDAL, C. J., inquired if they had put in separate pleas, and, being answered in the negative, said to *Talfourd*, Serjt., then you must address the jury for all three. The counsel for the others has a right to cross-examine the witnesses, but there must be only one speech.

Talfourd, Serjt., then inter alia stated, that, as to the fourth count for not calling in two sworn appraisers, Lord *Lyndhurst*, C. B., had expressed an opinion, that, under the 57 Geo. 3, c. 93, one sworn appraiser was sufficient when the goods were under 20*l.*, as the schedule of charges contained the words—“Appraisement, whether by one broker or more, 6*d.* in the pound on the amount of the goods.”

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Petersdorff then, on behalf of the landlord, who had appeared by a separate attorney, and had suffered judgment by default, addressed the jury, and contended that nominal damages would be sufficient under the circumstances.

Chassey, the man in possession, was called as a witness for the defendants. He stated that he went in on the 19th April, and the inventory was then taken; that on the 24th Chuck, senior, sent for Lawrence, an appraiser, but the plaintiff requested that Lawrence might not appraise the goods, because he did not wish any more expense, or to be exposed, and stated that he would be satisfied with Chuck's own appraisement, upon which Chuck condemned the goods himself. The condemnation was put in, dated the 24th, and expressed that Chuck had been sworn by one Hasler, a constable. The amount was 6*l.* 1*s.*, at which price the goods were offered to the plaintiff the same day; but he said he could not pay for them, and requested Chuck to write to the landlord to give him three months' further time. The witness added, that the plaintiff requested it might stand over till the next day, and said he would pay the expenses, which he did, amounting to 15*s.*, and the goods in consequence remained on the premises till the next day, when they were removed.

Wilde, Serjt.—I do not go on the first count, but on the count in trover, and on the other irregularities.

Talfourd, Serjt.—The judgment by default does not connect with us so as to sustain the count in trover.

TINDAL, C. J.—It is an admission on the part of the landlord that he was guilty with the others who have denied it.

Kelly.—A joint conversion must be proved against us on the general issue, which we have pleaded.

TINDAL, C. J.—It seems to me that he constitutes them his agents when he sends them in to make this distress; and if they wrongfully or negligently take away any thing they ought not, he is liable for their acts.

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Wilde, Serjt.—The protection thrown round the tenant by the statute is not matter of form, requiring only nominal damages. The distress broker could not be the party to condemn; Chuck's condemnation therefore was not legal. But he did not in fact condemn at all at the time; it was not written till after the removal of the goods. I cannot claim the verdict on the ground that the first distress was abandoned. No doubt the plaintiff thought it was; but it is possible they might not have so abandoned the first as to make the coming in again on the 25th a new distress; and, as they had the right to remain in, there is not that serious injury which makes it worth while to argue in support of it. I rest my claim, first, on the removal of the goods without condemnation; secondly, on the taking away goods which were not distrained, viz. the gross of Cobourg pipes, the electrifying machine, the model of a ship, and the sofa bedstead; and thirdly, on the ground of negligence in taking the distress. There was negligence in not counting the pipes, and in mixing different sorts together, and in selling, not being able to shew what quantity was sold. This was not reasonable care. As to the decision said to have taken place on the 57 Geo. 3, I contend, that, as the act was passed to give additional protection to poor tenants, it cannot by a particular phrase, obviously introduced to increase that protection, repeal an express provision in the former act.

TINDAL, C. J., (to the jury).—It appears to me that there are three points which must be submitted to your consideration; first, whether the defendants were guilty of selling the goods without having previously appraised them

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by two sworn brokers, as required by the statute? secondly, whether any damage was done to the goods by want of proper care in the removal of them? and, thirdly, what damage has been occasioned by the sale of those articles which were not in the inventory? According as you find the counts relating to these matters sustained or not by the evidence, you will find your verdict for the plaintiff or the defendants. On the first point you must say what damage the owner of this property has sustained by reason of its not having been appraised. There is no evidence of the time at which the sale took place; and if the appraisement was made before the taking for the purposes of sale, all would have been done that was necessary as far as the time was concerned. Then you will consider whether the necessity of the appraisement was dispensed with by the plaintiff; for, if you are satisfied that it was, then he cannot bring an action for the neglect of that which he has himself dispensed with. I recommend you, if you find for the plaintiff on any of the three grounds I have mentioned, to find the damages separately on each, as it may prevent the parties from coming here again.

The jury found for the plaintiff—damages on the first ground, 85*l.*; on the second, 10*l.*; and on the third, 5*l.*

Wilde, Serjt., and *Steer*, for the plaintiff.

Talfourd, Serjt., for one defendant.

Kelly, for two others.

Petersdorff, for another.

[Attornies—*Branscomb* and *Grover*,—*J. Harman*.]

COURT OF KING'S BENCH.

Adjourned Sittings in London after Trinity Term, 1834,

BEFORE LORD DENMAN, C. J.

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REX v. WILLIAM STOVELD.

July 9th.

INDICTMENT for perjury in an affidavit on shewing cause against a rule in a case of Winterflood and others against the defendant. The indictment averred that there was an action pending between Winterflood, Combe, and Brown, and the defendant, William Stoveld.

If in an indictment for perjury against C. D. it is averred that a cause was depending between A. B. and C. D., a notice of set-off intituled in a cause A. B. against C. D., and signed by the attorney of C. D., is not sufficient evidence to support the allegation.

The writ was not produced; but to shew the existence of the action, the attorney for the prosecution, who was attorney for the plaintiffs in the action, produced a notice of set-off intituled in the cause, which he swore he received from the attornies for the defendant in the action.

Follett, for the defendant, objected to the receipt in evidence of the notice of set-off. It can at most be only secondary evidence. The proper evidence is the writ, &c. There is no proof that the writ or the issue roll are lost. The secondary evidence is not admissible; I object to any evidence till the writ is produced, or its non-production accounted for.

LORD DENMAN, C. J.—There is an averment in the indictment that there was an action pending.

Sir J. Scarlett, for the prosecution.—I admit that I cannot carry the case any further. The only distinction which I can venture to offer is, that it is an admission of the party that there was an action brought against him. If this proceeding were between other persons than those who were parties to the action, it would not be sufficient.

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Lord DENMAN, C. J.—I am very unwilling to stop a proceeding of this sort, particularly for the sake of defendants. It is the duty of counsel to take these objections, but it is much more satisfactory for the interests of justice that these cases should be decided upon the merits. But really I think it is an insuperable objection. The evidence is given in this proceeding, and it is averred in the indictment that an action was pending between Winterflood, A. B. and C. D., and William Stoveld. I think the defendant must be pronounced not guilty.

Follett.—Your Lordship is of opinion that it is the duty of counsel to take such objections.

Lord DENMAN, C. J.—Yes, it is undoubtedly the duty of counsel to take such objections; but it is also the duty of the Court to lean against them.

Verdict—Not guilty.

Sir J. Scarlett and *R. V. Richards*, for the prosecution.

Follett and *W. H. Watson*, for the defendant.

[Attornies—*Brooks*, and *E. Blackmore*.]

COURT OF EXCHEQUER.

Adjourned Sittings at Westminster after Michaelmas Term, 1833.

BEFORE LORD LYNTHURST, C. B.

1833.

WOODWARD v. COTTON (*a*).

DEBT.—To recover a penalty of 50*l.* under the 97th section of the statute 5 Geo. 4, c. 125 (*b*), concerning, *inter alia*, the lighting, watching, amending roads, and preventing nuisances and annoyances in the parish of St. Mary, Islington.

The declaration contained twenty-seven counts, which charged the defendant in various forms with having narrowed and arched over a certain ditch or watercourse, without the consent or approbation of the trustees mentioned in the above statute; and also with having so done contrary to the terms on which the trustees had given their consent, *viz.* in the size or capacity of the ditch or watercourse. The plea was the general issue.

a penalty inflicted by an act of Parliament upon any person who alters, covers in, or arches over any drain, &c. contrary to the consent of trustees mentioned therein.

The arching over an *old ditch of smaller dimensions* than were mentioned in a consent to the making of a sewer in writing by certain trustees under an act of Parliament, was held to be a breach of a section providing that no ditch, drain, or other watercourse should be narrowed, filled up, altered, covered in, or arched over *without the consent* of such trustees, nor in any other manner than should be *expressed in such consent*.

(*a*) Not inserted before on account of a motion pending, which was not decided till after the publication of the last number.

(*b*) That section, after enacting that the trustees might widen, deepen, &c. &c. all the watercourses, contained the following words:—"Provided always, that no ditch, drain, or other watercourse shall be narrowed, filled

up, altered, covered in, or arched over by any person or persons whatsoever, without the consent and approbation of the trustees in writing first had and obtained, nor in any other manner than is or shall be expressed in such consent;" and then it proceeded to state that any person who did so should for every offence be subject to a penalty of 50*l.*

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A local act, containing the usual clause that it shall be deemed and taken to be a public act, &c., may be read in evidence without any proof of its having been printed by the King's printer, or compared with the original on the Rolls of Parliament.

A surveyor, who gives directions in the progress of the work of making a sewer, is liable to an action for

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The plaintiff was a trustee under the act, and the defendant a surveyor employed to superintend the erection of several houses at Holloway. A sewer being requisite, the defendant applied to the trustees for leave to make one from Holloway Place to Walter's Buildings, in which line there was a ditch extending between two other sewers, which ditch it was proposed to convert into the new sewer. The required permission was given by the trustees, with a stipulation that the sewer should be of 13 feet capacity. In fact it was made of 10 feet capacity only. The evidence to connect the defendant with the doing of the work was, that, on application for instructions by a bricklayer, after one end of the sewer had been begun, he said, "There is the other end done; do it just as they are doing it." It appeared that the defendant had not any interest in the property, which belonged to the assignees of persons named Harvey and Grice; and also that the directions given at the commencement of the arching over of the ditch were given by one Shelley, who was a person employed in the building of the houses, and was to build a sewer 3 feet in width and 4 feet in height. It was also proved, that, after the consent of the trustees, and before the sewer was commenced, a letter was written to them by the solicitor for the assignees, stating that they had been required to make a sewer of much larger dimensions than appeared to them to be necessary, and requesting that a meeting might be called to vary the previous consent. To this an answer was returned, stating that the trustees would not depart from their original determination.

The act of Parliament contained the usual clause, that it should be deemed and taken to be a public act, and taken notice of by all judges, &c. without being specially pleaded. It was read without any proof as to when it was printed, or as to its being correct according to the rolls of Parliament.

Steer, for the defendant, submitted that the plaintiff

must be nonsuited. The act of Parliament has not been proved as it ought to be. It is only for the present purpose a private act, and cannot be judicially taken notice of. Roscoe on Evidence, p. 53, where the case of *Brett v. Beales* is referred to. That was the Cambridge Toll case (a), and it was there contended that, as power was given to tax the king's subjects, it was a public act. Lord Tenterden took time to consider and consult with the other Judges, and the next morning said he had consulted the Judges of that Court, and they were all of opinion that the act must be proved.

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Lord LYNTHURST, C. B.—Have you looked at the acts repealed by the present statute?

Shee, for the defendant.—The acts repealed are all private acts, as appears from the statement of them in the recital. Besides, it is for them to shew that the act repeals public acts, and thereby acquires a public character.

Lord LYNTHURST, C. B.—I think it seems to relate to some public matters. I think it is a public local act, and I shall not stop the cause. If there is any thing in your objection, you shall have the benefit of it hereafter.

Steer then submitted, that, as what was arched over was only an old ditch, and not an old drain, the act did not apply.

Lord LYNTHURST, C. B.—It was proved that it was a ditch between two sewers, and, if it was not a watercourse, those sewers would have been useless. If it had been a dry ditch, perhaps the objection might have been correct.

Steer then further submitted, that building contrary to

(a) It is reported in Moo. & Malk. p. 421.

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the act was the only thing subjecting a party to the penalty, and not building contrary to the resolutions of the trustees.

Lord LYNDHURST, C. B., thought that the building, without a consent for the particular mode of building, was a building contrary to the intent of the act of Parliament.

Steer then addressed the jury, and contended that the defendant, as a surveyor, and consequently as an agent only, was not liable; but that the principal was the person answerable as the person who did the act complained of.

Witnesses were called for the defence, but the substance of their evidence has been embodied in the statement of the facts of the case.

It being contended that the trustees, if they had intended to insist on the particular width of the sewer, should not have given their permission to the making of it in the line of an existing watercourse which was of smaller dimensions—

Lord LYNDHURST, C. B., said—I am of opinion that we cannot inquire into the propriety of the direction of the sewer on a question of size. The Legislature has left it to the trustees to decide, and they have decided, and the act of Parliament is imperative.

Steer.—It goes to shew that we have not narrowed it.

Lord LYNDHURST, C. B.—But you cover it in. You are not to alter or cover in any old watercourse contrary to the order of the trustees. If they have exercised an improper discretion, they may be dealt with in some other way. The question we have to try is, whether you have disobeyed the direction of the trustees.

His LORDSHIP (in summing up) said:—It seems to me that there is no contradiction of the witness who says that

the defendant gave orders to go on with the work. The trustees have no interest in the penalty; they must apply it to the purposes of the act. They have a public duty cast upon them to see that the sewers are made of the proper dimensions. It seems to me that the plaintiff's evidence is not contradicted, but on the contrary is confirmed by one of the defendant's witnesses. You will have to find whether the defendant gave directions as surveyor for the work to be done; and, if you think he did, you will find as a consequence that the plaintiff is entitled to a verdict for a penalty of 50*l*.

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Steer, for the defendant, stated that the plaintiff's counsel must select one of the twenty-seven counts on which to have the verdict entered, as only one act had been proved to have been done.

Lord LYNDHURST, C. B., assented, and *Holt*, for the plaintiff, selected the 20th count, for arching over a drain contrary to the consent of the trustees; and upon this count a verdict was entered for the plaintiff, and for the defendant upon all the others.

Holt, and *Follett*, for the plaintiff.

Steer, and *Shee*, for the defendant.

[Attornies—*Oldershaw*, and *Bolton*.]

In the ensuing term, *Steer* obtained a rule *nisi* for a nonsuit, upon the two points made at the trial, as to the proof of the act of Parliament, and the liability of the defendant as surveyor; which rule, after argument, was in a subsequent term discharged (a).

(a) See 1 Cr., Mee. & Rose., *Beaumont v. Mountain*, 4 Moore p. 44. On the point as to the act & Scott, 177. of Parliament, see the case of

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Sittings at Westminster, in Easter Term, 1834.

BEFORE MR. BARON GURNEY.

HERRING v. BOYLE.

A. (a boy) was placed at the defendant's boarding school by his mother, whom the defendant afterwards refused to permit to take him away. A. was not detained against his own will, nor did he know that his mother had applied to have him restored to her:—Held, that an action for false imprisonment did not lie against the defendant at the suit of A., but that his mother might have maintained an action in a different form.

FALSE imprisonment. Plea—general issue.

It appeared that the plaintiff was a boy who was placed by his mother at the defendant's boarding school, and that the plaintiff's mother went there to fetch him away, when the defendant refused to let her take him away, or even see him, unless the amount of a quarter's schooling was paid, though not then due; the plaintiff's mother demanded the plaintiff twice, but without success, the defendant declaring that he would not deliver up the boy unless compelled by *habeas corpus*, and the plaintiff was not sent home to her till after she had sued out a writ of *habeas corpus*. There was no evidence that the detention of the plaintiff at the school was against his will, or that he was at all aware of what had taken place between his mother and the defendant.

GURNEY, B. (having conferred with the other learned Barons), said:—We think that the plaintiff must be nonsuited, it not being proved that any restraint was imposed upon him against his will; although we think that an action in a different form might have been maintained at the suit of the parent.

Nonsuit.

Comyn, and *Butt*, for the plaintiff.

Hutchinson, for the defendant.

[Attornies—*J. Wright*, and *Kearns*.]

ON a subsequent day, *Comyn* moved to set aside the nonsuit; and the Court granted a rule to shew cause, which, after argument, was discharged.

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Sittings in London, after Trinity Term, 1834.

BEFORE MR. BARON ALDERSON.

WARR v. JOLLY.

June 28th.

SLANDER.—The declaration stated that the plaintiff had been engaged as a probationary minister to a dissenting congregation at St. Leonard's, near Hastings, in order that if approved of he should be appointed to be the permanent minister of that congregation; yet the defendant, contriving &c., in a discourse with George Bennett, spoke the words (which imputed hard drinking to the plaintiff), whereby the congregation refused to appoint him permanent minister. Plea—General issue.

It appeared that the plaintiff had officiated at the Quadrangle Chapel at St. Leonard's, and was, at the desire of Mr. Jackson, to preach at the Wesleyan Chapel at Hastings on a particular Sunday. But on the preceding Saturday Mr. Jackson sent the following letter:—

“Dear Sir,—I have been a little too hasty in inviting you to take my pulpit to-morrow, since I find, that, owing to circumstances over which I have no control, it will not be agreeable.—I am, dear Sir, your's,

“George Jackson.”

On the following Monday the plaintiff shewed the letter to Mr. Bennett, and, in consequence of the advice of the latter, the plaintiff and Mr. Bennett (who suggested that the defendant could throw some light on the matter) went to the defendant, and, in answer to questions put by them, the defendant spoke the words in question, which were—“Mrs. Jolly has recently returned from Romsey; the independent minister of that place has cautioned her, and through her myself, against you, that you were a man of intemperate habits, and, in proof of it, on one

The plaintiff, a dissenting minister, accompanied by a friend went to the defendant, who, in answer to questions put by plaintiff and his friend, stated that his (the defendant's) wife had been cautioned against the plaintiff as a drunkard, &c.:—Held, that this was a privileged communication, and that slanderous expressions used in it were not actionable, if the defendant spoke *bona fide*, and was not actuated by malice:—Held, also, that it was incumbent on the plaintiff to prove that the defendant was actuated by malicious motives.

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occasion you called upon a widow lady at Gosport; she asked you to take refreshment, you chose cold brandy and water; she uncorked for you a bottle of brandy—a whole bottle of brandy—and you drank the whole contents of the bottle before you left the table;” and also that the plaintiff was “fond of lifting his hand to his mouth.” The special damage was not proved. There was no evidence of it.

Bompas, Serjt., for the defendant. As the words used were in answer to questions asked by the plaintiff, this is a privileged communication.

ALDERSON, B.—If the communication was not made *bond fide*, I think the plaintiff will be entitled to a verdict.

Bompas, Serjt., addressed the jury.

ALDERSON, B., (in summing up).—The words are privileged by the occasion, unless you are satisfied that they were not spoken *bond fide*, and that the defendant was actuated by malice; and it lies on the plaintiff to shew that the defendant was actuated by malicious motives.

Verdict for the defendant (a).

Knowles and *Guest*, for the plaintiff.

Bompas, Serjt., and *Clarkson*, for the defendant.

[Attornies—*Wright & W.*, and *Palmer & F.*]

(a) See the cases of *Cockayne v. Hodgkinson*, ante, Vol. 5, p. 543; and *Woodward v. Lander*, post.

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BEFORE MR. BARON PARKE.

TIMOTHY v. SIMPSON.

July 2nd.

ASSAULT and false imprisonment. Pleas—*first*, general issue; *second*, that the defendant was possessed of a dwelling-house, and that the plaintiff was there making a great noise, disturbance, and affray in the breach of the peace of our lord the king; that the defendant requested him to depart, but that he refused, and continued the making of the noise, disturbance, and affray, whereupon, to preserve the peace, the defendant gave charge of the plaintiff to a certain policeman. Replication—*De injurid.*

It appeared that the plaintiff was an upholsterer in Aldgate, and the defendant a linen-draper in Bishopsgate-street Without, who had in his shop-window a number of articles of linen drapery, with prices marked upon tickets affixed to them.

It further appeared from the evidence of the plaintiff's clerk, Charles Ellis, that, at about five o'clock in the afternoon of the 27th of December, the plaintiff and his clerk saw a dress in defendant's shop window, marked 5*s.* 11*d.*, which the plaintiff asked his clerk to buy; the clerk went into the defendant's shop and asked for it, and gave the defendant's shopman a sovereign, desiring him to take 5*s.* 11*d.* out of it. He said the dress was 7*s.* 6*d.* The clerk asked how it came to be marked 5*s.* 11*d.*; and the shopman said he could not help that. The plaintiff then came in, and said it was an imposition. One of the shopmen said, "I suppose we must let him have it;" and another said, "Don't let him have it; he is only a Jew; turn him out." The shopmen then turned the plaintiff out of the shop; a policeman was sent for, who took the

A. kept a shop, in the window of which goods were ticketed at certain prices. B. entered the shop and demanded one of the articles at the price marked, which the shopman refused to let him have, and desired him to leave the shop. B. refused, and the shopmen struck him. Upon this A. came into the shop, and gave B. into custody:—Held, that B. was a trespasser in remaining in the shop after he had been told to leave it by the agent of the owner:—Held, also, that A. was not liable for the assault committed by the shopmen before he came into the shop.

If a person does not assist in a trespass, either in word or deed, he is not liable for it.

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plaintiff into custody, and he was taken to the station-house by the direction of the defendant.

Another witness, named Christie, stated that he was present, and heard the defendant's shopman desire the plaintiff to leave the shop; he said he would not without the dress. A person said that the plaintiff had no money, and upon this he produced some gold. Several persons then struck the plaintiff; and the witness, being frightened, ran up stairs, and met the defendant coming down (he not having been present before), and desired him to assist the plaintiff.

Bompas, Serjt.—I submit that the defendant is not liable for the conduct of his servants. When he came down stairs, there was an affray and a breach of the peace, which justified him in giving all the parties concerned in charge.

Thesiger, for the plaintiff.—If a man advertises goods at a certain price, I have a right to go into his shop and demand the article at the price marked.

PARKE, B.—No; if you do, he has a right to turn you out. The plaintiff was a trespasser in continuing in the house. He had no right to continue there against the will of the owner or his agent. I think that the plea is bad in not stating that the policeman saw the affray; and I think the better way will be, to enter a verdict for the defendant, with leave for the plaintiff to move to enter a verdict for him for such damages as the jury shall think him entitled to.

Bompas, Serjt., addressed the jury for the defendant.

PARKE, B. (in summing up).—The defendant is not answerable for the misconduct of his shopmen towards the plaintiff, as it occurred during his absence from the shop.

If a person does not assist in a trespass, either in word or deed, he is not liable for it.

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Verdict for the plaintiff on the general issue; and verdict for the defendant on the justification, with leave to move to enter a verdict for the plaintiff, with 15*l.* damages.

Thesiger and *Henry*, for the plaintiff.

Bompas, Serjt., and *Hutchinson*, for the defendant.

[Attornies—*Nias*, and *Lloyd*.]

IN the ensuing term, *Thesiger* moved to enter a verdict for the plaintiff, in pursuance of the leave given; and the Court granted a rule to shew cause.

JOEL v. MORISON.

July 3rd.

THE declaration stated, that, on the 18th of April, 1833, the plaintiff was proceeding on foot across a certain public and common highway, and that the defendant was possessed of a cart and horse, which were under the care, government, and direction of a servant of his, who was driving the same along the said highway, and that the defendant by his said servant so carelessly, negligently, and improperly drove, governed, and directed the said horse and cart, that, by the carelessness, negligence, and improper conduct of the defendant by his servant, the cart and horse were driven against the plaintiff, and struck him, at a time when it is not wanted for the purposes of business, and drive it about solely for his own purposes, the master will not be answerable for any injury he may do.

If a servant driving his master's cart, on his master's business, make a detour from the direct road for some purpose of his own, his master will be answerable in damages for any injury occasioned by his careless driving while so out of his road. But if a servant take his master's cart without leave,

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whereby he was thrown down and the bone of one of his legs was fractured, and he was ill in consequence, and prevented from transacting his business, and obliged to incur a great expense in and about the setting the said bone, &c., and a further great expense in retaining and employing divers persons to superintend and look after his business for six calendar months. Plea—Not guilty.

From the evidence on the part of the plaintiff it appeared that he was in Bishopsgate-street, when he was knocked down by a cart and horse coming in the direction from Shoreditch, which were sworn to have been driven at the time by a person who was the servant of the defendant, another of his servants being in the cart with him. The injury was a fracture of the fibula.

On the part of the defendant witnesses were called, who swore that his cart was for weeks before and after the time sworn to by the plaintiff's witnesses only in the habit of being driven between Burton Crescent Mews and Finchley, and did not go into the City at all.

Thesiger, for the plaintiff, in reply, suggested that either the defendant's servants might in coming from Finchley have gone out of their way for their own purposes, or might have taken the cart at a time when it was not wanted for the purpose of business, and have gone to pay a visit to some friend. He was observing that, under these circumstances, the defendant was liable for the acts of his servants.

PARKE, B.—He is not liable if, as you suggest, these young men took the cart without leave; he is liable if they were going *extra viam* in going from Burton Crescent Mews to Finchley; but if they chose to go of their own accord to see a friend, when they were not on their master's business, he is not liable.

His Lordship afterwards, in summing up said—This is

an action to recover damages for an injury sustained by the plaintiff, in consequence of the negligence of the defendant's servant. There is no doubt that the plaintiff has suffered the injury, and there is no doubt that the driver of the cart was guilty of negligence, and there is no doubt also that the master, if that person was driving the cart on his master's business, is responsible. If the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible. If you think the servants lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or, if you think that the young man who was driving took the cart surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable. As to the damages, the master is not guilty of any offence, he is only responsible in law, therefore the amount should be reasonable.

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Verdict for the plaintiff—damages, 30*l*.

Thesiger and *S. Martin*, for the plaintiff.

Platt, for the defendant.

[Attornies—*Copes*, and *Nickson & Morison*.]

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BEFORE LORD LYNTHURST, C. B.

July 7th.

In trespass for false imprisonment proof must be given of circumstances from which the Judge and jury may decide whether there was or was not a restraint or detention of the person; and it is not enough for witnesses swear that they considered the plaintiff was in custody, and thought that he was under restraint; nor is it enough to shew that the defendant, at a police-office, stood before the plaintiff and said, "You cannot go away till the magistrate comes," if it appears that he relinquished that attitude, and went to another part of the office before the plaintiff had made any attempt to depart.

CANT v. PARSONS.

TRESPASS for falsely imprisoning the plaintiff, and causing him to be taken before a magistrate, and charged with embezzlement. Plea—Not guilty.

It appeared that the defendant, seeing the plaintiff and another person in the street, desired a policeman to take them into custody for embezzlement and swindling. The policeman objected, but told the persons if they would be so good as to go with him he would take the advice of his superior. They all went together to the station-house, and were referred from thence to the police-office. The policeman, who was called on the part of the plaintiff, said that the parties were never in his custody; that they heard him refuse to take charge of them, and went voluntarily with him, and that he should have suffered them to go away if they had pleased.

LORD LYNTHURST, C. B.—How is this an imprisonment?

Andrews, Serjt., for the plaintiff, replied that the imprisonment took place before the magistrate.

The policeman stated further, that when they got to the office the magistrate was not sitting, and the plaintiff and his friend went with him to a public-house in the neighbourhood and had some ale, and when the magistrate arrived they went before him—that the plaintiff went to the bar voluntarily.

An inspector of the police was also called as a witness, and he stated that the impression he had was that the

plaintiff could not go away, but that he was not in custody of the officer; that the defendant asked him to let the officer remain with the plaintiff till the magistrate came, which he refused. He added that he did not know what the defendant said, but had no doubt in his own mind that the plaintiff was detained.

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Lord LYNDHURST, C. B.—Let us have the facts that we may see whether he was detained or not. You must tell us by whom he was detained. You must tell us what the defendant did or said, that we may judge.

The witness: "He stood before him, and said, 'You cannot go away till the alderman comes.' I then took him to the clerk to tell his story to him. I think the defendant kept too good a look out for the plaintiff to go away."

Lord LYNDHURST, C. B.—You will not distinguish between a man's going to a place and a man's being forced to a place. We are not to decide a cause upon suspicion.

Another witness stated, among other facts, that he saw the plaintiff at the police-office draw away his arm from the policeman.

The magistrate's clerk stated that he saw no restraint put upon the plaintiff; that the defendant charged him with fraudulently removing goods; and that the charge was dismissed by the magistrate.

Platt, for the defendant, submitted that the plaintiff ought to be nonsuited.

Lord LYNDHURST, C. B.—There is enough to go to the jury, if the jury believe the witness who says that he saw the plaintiff draw away his arm from the police-

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man. But that is quite at variance with the policeman's testimony. It is very difficult to decide when witnesses on the same side give different accounts of the transaction. The making a false charge is not the cause of complaint here, there must be an imprisonment of the party. His Lordship asked the jury if they were satisfied that the plaintiff was ever in custody.

The jury said they were of opinion that he was not.

Verdict for the defendant.

Andrews, Serjt., and ———, for the plaintiff.

Platt, for the defendant.

[Attornies—*J. M. Hill*, and *James*.]



July 7th.

PAULI v. SIMES and Another.

In an action by a party who has bargained with a broker for the sale of goods belonging to a third person, for assuming the right to sell without having authority, in order to make out a contract for the sale it is not necessary, in point of law, that there should be bought and sold notes.

If a party receiving an invoice does not

object to it on the ground of its brevity and incompleteness, the party furnishing it will be bound by it.

If brokers alter an invoice of the owner of goods from the name of one purchaser to another, and send it to the latter with a letter saying, that, to simplify the transaction, they had transferred the seller's invoice to him, such invoice will amount to a contract of sale.

THE first count in the declaration stated, that, in consideration that the plaintiff on the 13th July, 1833, would agree to purchase from T. R. Legg and T. R. Legg, jun., through the agency of the said defendants, and for commission and reward to them, 50 packs of wool, at a certain price of 17*l.* per pack, to be delivered by the said T. R. L. &c. to the plaintiff on payment, the defendants undertook and promised that they had full power and authority from Messrs. Legg to sell and dispose of the said goods from them to the plaintiff. It then averred that the plaintiff agreed to purchase the goods, and was ready to accept and pay for them, and requested Messrs. Legg to deliver them; yet the defendants did not perform their

promise, but deceived and defrauded the plaintiff in this, that they had not full or any power or authority from Messrs. Legg to sell the goods to the plaintiff; whereby the contract was not binding on them, and they refused to deliver the goods; by means of which the plaintiff lost the profits of the bargain, and incurred expenses in endeavouring to procure performance by Messrs. Legg, and also incurred expense in buying other wool to perform a contract with one Dahais, to whom he had engaged to sell 40 of the 50 packs, &c.

The second count was similar in substance to the first, but more concise, and omitted the statement of the contract with Dahais.

The third count stated that the plaintiff bargained with the defendants to buy, and they agreed to sell, the wools at 17*l.* per pack, to be paid for on delivery, and in consideration thereof the plaintiff promised to accept and pay for the goods, and the defendants promised to deliver them within a reasonable time, but did not, &c. &c. &c. Plea—Non assumpsit.

The following document was put in on the part of the plaintiff:—

“ Bermondsey, London, July 13th, 1833.

Messrs. E. Pauli & Co.

Bought of Thos. Legg & Son,

25 bags ——— 50 packs net Kent fleeces,				
at 17 <i>l.</i> per pack	850	0	0	
25 new sheets at 6 <i>s.</i> each	7	10	0	
Cartage, at 4 <i>d.</i> per pack	0	16	8	
	£858	6	8	
Discount 1½ for immediate cash	10	14	6	
	£847	12	2	

Commission ½ per cent.”

The name of Charles Devaux & Co. was struck out, and the name of E. Pauli & Co. written above; and on the back was written—“ Dear Sir,—In order to simplify

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the transaction, we have transferred Legg & Co.'s invoice to you; and remain your's truly, J. T. Simes & Co."

Lord LYNDBURST, C. B.—Upon this document, unexplained, I think Simes & Co. had authority to sell for Legg & Co. If Legg & Co. had brought an action against Pauli, they would call Simes to say that he had authority from them to sell. It seems to me impossible that Simes & Co., having represented themselves as the brokers, and charged for commission, can say that they had no authority from Legg & Co. Do you call Legg to shew that Simes & Co. had not authority, because *prima facie* it appears that Legg did give authority?

It appeared that the above invoice was sent to the plaintiff on the 16th of July, 1833; and Dahais, the person mentioned in the declaration, was called as a witness, and stated that he was at the plaintiff's counting-house at the time when the invoice came, and undertook to sell the wools for the plaintiff at Lisle. It was admitted that a demand of the wools was made of the defendants on the 17th, and on that day they wrote the following letter:—

" 58, Coleman-street, Wednesday morning.

"Sir,—We cannot get Thomas Legg & Son to deliver the 50 packs, as we cannot obtain an engagement that they shall not be called upon by the Frenchman for them, as he, it is said, in case of need, refers to his agent at Dover. Please return the invoice, as we find we cannot help you in the matter. Your's truly,

" J T. Simes & Co."

The plaintiff did not return the invoice, but tendered the price, and required the delivery; in consequence of which the defendants wrote—

" Sir,—We have to refer you to Messrs. Thomas Legg & Son, who decline delivering the 50 packs, as the parties from whom you must obtain the wool; and are, &c. &c."

Platt, for the defendants.—The declaration alleges that the goods were to be paid for on delivery. The paper put in as the contract contemplates two modes of payment, because it states two amounts, giving the party an option. This is a variance, and the plaintiff must be nonsuited.

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Lord LYNTHURST, C. B.—There is some evidence that the goods were to be paid for on delivery. In the invoice there is the amount, and the discount is ascertained, and *prima facie* I should take it that the discount was to be deducted, and there was to be immediate payment. I say it is *prima facie* so, but it is a question for the consideration of the jury.

Platt.—Pauli was to be approved by Legg & Co., and it was not a sale to Pauli in the first instance. It was no contract between the parties, because there was no mutuality. If Pauli had refused to take the wools, Leggs could not have compelled him. The note about commission was for Devaux's purchase. There was no definitive contract by the defendants as brokers on the part of Legg & Co. Then as to the damages, the amount must be limited to the difference in price between the two sales.

A clerk of the defendants' house proved, that, when they had a first transaction with a house, it was their invariable practice to put the amount of discount on the invoice. Messrs. Legg also proved that they did not give any authority to the defendants to sell the wools to the plaintiff. A witness was also called, who stated that there was a long conversation between the plaintiff and one of the defendants about the wools; but that the whole purport of the conversation was that the defendant said, "I will get them for you if I can."

Follett, for the plaintiff, in reply, relied on the two letters; and also said, as to the objection on the ground of

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want of mutuality, the contract is mutual, for Simes & Co. were the agents of both parties. If there had been bought and sold notes, they would have been signed by the brokers for both, and the effect of this invoice is equivalent. But it is not necessary that both should be bound. If a party undertakes to deliver, he is bound to deliver. Simes & Co. first cancelled the contract with Devaux & Co. (which Leggs say they have no right to do), and they made a complete bargain with Pauli, for the non-performance of which they are liable.

Lord LYNTHURST, C. B. (in summing up).—It is alleged that the wools were sold by the defendants as the agents of Messrs. Legg & Co., who gave them no authority to sell, in consequence of which the plaintiff has sustained damage. You must be satisfied, first, that the wools were sold by the defendants, as the agents for Messrs. Legg & Co., to the plaintiff; and secondly, if they were, did they sell without authority? Upon this point there is no doubt, because Messrs. Legg have stated upon their oath that they did not give the defendants any authority. It resolves itself, therefore, into this question: did the defendants sell the goods professedly as the agents of Messrs. Legg & Co. I am of opinion, on the face of this invoice, unexplained by any evidence, that this would in point of law be an engagement on the part of the defendants that the goods mentioned therein should be delivered to the plaintiff. Two letters have passed between the parties. It will be for you to say, taking these two letters into consideration, whether you think that this was a concluded agreement between Pauli on the one hand, and Simes & Co. on the other, for the sale of these goods. The objection as to the absence of bought and sold notes is not an objection in point of law. Pauli might have objected to so short and incomplete a note, but he does not. Parties in commercial transactions do not require all they might, and trust somewhat to honour. There is nothing at all in

the objection that the instrument is binding only on one side, because it is binding on the party to be charged. With respect to the statement of the witness for the defendants, that the whole purport of the conversation was, "I will get them for you if I can," if you believe it, it should seem not a concluded contract. But I think you cannot very safely rely on evidence obtained under such circumstances, and given at such a distance of time. But that is entirely for your consideration.

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Verdict for the defendants.

Follett and Hoggins, for the plaintiff.

Platt and Steer, for the defendants.

[Attornies—*Rains*, and *Paterson*.]

BEFORE MR. BARON ALDERSON.

(*Who sat for the Lord Chief Baron.*)

D'ARANDA, Executrix of D'ARANDA, deceased,
v. HOUSTON and Another.

July 10th.

DEBT on a bond, dated February 18th, 1833, to secure the payment of 350*l.*, agreed to be given as the purchase-money for a medical business; 50*l.* was paid down, and the remainder was to be paid by instalments of 50*l.* a year. One only was due at the time when the action was commenced. The pleas were, *first*, *non est factum*; *second*, that the bond was obtained by fraud, covin, and mis-

In debt on a bond (with *non est factum inter alia* pleaded), to secure the payment by instalments of the consideration for the purchase of a business, the plaintiff ought to suggest breaches, and if

he has not done so, and a verdict be found for him on the plea of *non est factum*, he is not entitled to a certificate for speedy execution under the statute.

Also, in such a case, to support a plea that the bond was obtained by fraud, covin, and misrepresentation, it is not enough to shew that the business did not produce to the purchaser the sum represented by the seller; but if it be shewn that it did not produce the sum to the seller himself, it will be enough, as in such case it may be assumed that the representation was untrue to the knowledge of the party making it.

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representation; and, *third*, that the bond was not duly stamped.

Profert of the letters of administration was made in the declaration, and—

ALDERSON, B., stated that the plaintiff need not produce them (*a*).

The bond was proved and read.

ALDERSON, B.—The grave question will be, whether this trial will not be thrown away, as they have not assigned breaches under the statute 8 & 9 Will. 3, c. 11.

Price, for the plaintiff.—It is a money bond.

ALDERSON, B.—I am aware of that. However, I must try the issue. That will be a question for next term. There is a very elaborate note of Serjt. Williams on this point (*b*).

Price.—It was much considered in the case there cited.

ALDERSON, B.—I am going to try whether it is the deed of the defendants.

R. S. Richards then addressed the jury for the defendants.—I can shew that the plaintiff's testator represent-

(*a*) In all actions by and against executors, if the character is stated on the record, it is not to be considered in issue unless specially denied. Rules H. T. 4 Will. 4, No 21.

(*b*) In 2nd Williams' Saunders, p. 187, n. 2, it is said, "So, where a bond is conditioned for the payment of a certain sum by instal-

ments, it is within the statute;" and reference is made to *Willoughby v. Swinton*, 6 East, 550. We presume the learned Baron referred to a note commencing on p. 57, and concluding on p. 58 *e*, in which reference is also made to the note from which the foregoing extract is taken.

ed that the business was worth 900*l.* a year, and that it was not worth anything like that sum. Also, I can shew that there was not any introduction of the purchaser of the business to the patients.

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ALDERSON, B.—That is no defence; it is a breach of contract, and not a misrepresentation.

R. S. Richards.—Perhaps it may be ground of a cross-action; but I shall shew that the representations as to the value of the business were not true.

ALDERSON, B.—If you prove no more than that, I shall tell the jury that it is not sufficient. You must shew that the representations were not true to the knowledge of the party making them.

R. S. Richards.—A party must of course be supposed to know the extent of his own business; it is a matter within his own personal knowledge.

ALDERSON, B.—If you shew that he himself did not make the amount, that will be sufficient; but merely shewing that the business did not produce as much to you will not do.

A son of the testator was called, who stated that he took part in the negotiation for the business, and saw Dr. Houston on the subject several times before the transfer, and had conversation with him on the subject.

ALDERSON, B.—You may state to the jury any communications which your father directed you to make to Dr. Houston. Not all the conversation you had with him, but such communications as you made by the direction of your father.

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The witness stated that in substance he represented the business to be very valuable, and capable of being increased, which was true; that he himself was not a medical man, and had not seen his father's books; but he supposed his father was doing a practice of nearly 1000*l.* a year, from the establishment he kept, and his having brought up a large family.

ALDERSON, B. (to the jury.)—There is no proof of the fraud. You must find your verdict for the plaintiff on the plea of *non est factum*, and negative the existence of fraud.

A son of the defendant, Dr. Houston, was afterwards examined, and stated that he had examined the books of the testator, which were left in the surgery, and judged from them that the business was not anything like what it was represented to be. He stated that the examination took place before the bond was executed, but after his father had got into the business.

Verdict for the plaintiff—Damages, 1*s.*

Price applied for immediate execution under the statute.

ALDERSON, B.—I have great doubts whether some application may not be made to the Court next term. How can I give you execution, at least, until you have suggested breaches? And I doubt whether you can do it now. At present, as you have not suggested breaches, I shall not make any order. You see it will be necessary, as soon as breaches are assigned, that a jury should be summoned to assess the damages. I shall not at present make any order for execution.

Price, for the plaintiff.

R. S. Richards, for the defendants.

[Attornies—*Griffith*, and *Burt*.]

See the case of *James v. Thomas*, 2 Man. & Nev. 663.

OLD BAILEY SESSIONS.

JULY SESSION, 1834.

BEFORE MR. JUSTICE BOSANQUET AND MR. JUSTICE
PATTESON.

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REX v. EDWARDS and Others.

July 7th.

INDICTMENT on the statute 7 & 8 Geo. 4, c. 29,
s. 6 (a).

The first count of the indictment charged that the prisoners did, on the 12th of May, 1834, with menaces and by force, feloniously demand of William Gee his money, with intent to steal it. The second count charged that the prisoners did feloniously assault the said William Gee, with intent his monies from his person and against his will violently and feloniously to steal.

If a person with menaces demand a sum of money of another, and that other does not give it to him because he has it not with him, this is a felony within the stat. 7 & 8 Geo. 4, c. 29, s. 6; but if the person demanding the money knows that the money is not then in the possession of the party, and only intends to obtain an order for the payment of it, it is otherwise.

In his opening of the case, *F. V. Lee*, for the prosecution, stated the following facts:—Mr. Gee was an attorney, living in Bishop's Stortford; the prisoner Edwards was a person recently married to Mrs. Canning; and the other two prisoners were not otherwise known than as con-

(a) By which it is enacted, "that if any person shall assault any other person with intent to rob him, or shall with menaces or by force demand any such property [i. e. any chattel, money, or valuable security] of any other person with intent to steal the same, every such offender shall be guilty of felony, and, being convicted thereof,

shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit), in addition to such imprisonment."

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nected with this transaction. Mrs. Canning's late husband, a farmer, resided in the country, and died in 1828, leaving children, and appointing under his will Maria Canning, his wife, his executrix, and Mr. Nassau Bell his executor. By the terms of his will, the interest of his property was given to Mrs. Canning during her lifetime, provided she did not marry; but, in case she died or married, then the property was to go to his children. After his death there arose some difficulty in settling the affairs, and the property was not all realized until the year 1832, at which time the interest upon the sum of 2000*l.* was found to belong to Mrs. Canning, under the provisions already stated. Of this sum 1200*l.* was placed out on freehold property at interest, the necessary deeds having been previously inspected and approved of by a gentleman on behalf of Mrs. Canning. The residue, 800*l.*, was put into the hands of a banker until an opportunity should occur of investing it eligibly. From that time up to the present Mrs. Canning had received the interest of these investments, and on the 12th of May, 1834, she married the prisoner Edwards, which circumstance was not at that time known. On the 3rd of May, 1834, Mr. Gee received a letter, which letter was to the effect that the writer had some documents in his possession relating to some estates he was about to purchase, and that he wished Mr. Gee to name the earliest day when he would be at leisure to come to town and inspect the documents professionally. This letter was signed William Heath. In answer to this letter Mr. Gee wrote that he would be in town on the 12th of May; and while he was at breakfast at the Bull Inn, Aldgate, on that morning, the prisoner Weedon came to him and brought a letter in the following terms:—

“ May 12, 1834.

“ Sir—In consequence of serious indisposition, I cannot meet you according to appointment; but I trust you will not object to come down to the Commercial-road to me, as it is not more than one mile, and I have sent a coach to

take you there and to bring you back again. Your's, respectfully,
 " W. Heath."

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Mr. Gee had previously done business for a person of the name of Heath, and concluding the writer of the letter to be the same person, he did not feel any reluctance in complying with the writer's wishes. He asked Weedon if Heath was not a seafaring man, but Weedon made him no answer. Mr. Gee accompanied Weedon to a place in the Commercial-road. Weedon knocked at the door of a house, and, on entering, the first person whom Mr. Gee saw was Edwards. Mr. Gee asked him if he was the Mr. Heath who signed the letter? to which Edwards replied he was not; it was his brother, who was down stairs in the kitchen taking his breakfast, adding that he wished Mr. Gee to go down and speak to him. Mr. Gee proceeded to descend the stairs, and whilst doing so he was laid hold of by the three prisoners, who forced him into a retired place in the house. Mr. Gee was forced through a door along a yard into a place constructed with wood, and covered thickly with soil so as to prevent the cries of any person from being heard. When he was put there Mr. Gee asked what it all meant, but no answer was then returned. He was then pushed down on a bench, and a chain was passed across his breast, Weedon feeling it to ascertain if it was sufficiently tight. Mr. Gee, however, expanded his breast, so as to give himself as much freedom as possible, after which the chain was padlocked. A cord was passed round his neck, and his legs were also fastened with a cord to some staples in the ground. Mr. Gee asked the cause of this violence. Edwards said, " You know Mrs. Maria Canning?" Mr. Gee replied, " I do; and I am quite sure she is not aware of what you are doing." Edwards said, " You have got some money of hers." Mr. Gee said " there was 2000*l.*, but he must be aware 1200*l.* was placed out at interest with Mrs. Canning's approbation, and that she had also received the interest for the

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remaining 800*l*.” Edwards replied, “I don’t care for that; there you are, and you shan’t stir from this spot until you pay us down this 1200*l*.” Mr. Gee replied, “For God’s sake consider that I have a family; let me go.” Edwards said, “No; you shan’t stir until you pay us 1100*l*. or 1200*l*.” Mr. Gee said, “I shall not; I have no money belonging to Mrs. Canning but what is already disposed of. Perhaps you are her brother?” The prisoner Edwards made no reply, but said he must have the money and deeds. Mr. Gee said the deeds were with Mr. Nassau Bell, and Edwards told him to send him a note and get them. Mr. Gee said the money was in a bank; and, if he were permitted to write to his family, he would send for the required sum. Edwards replied, “No, I’m not such a fool as to let you do that. I’ll get you pen, ink, and paper, and you can write a letter here.” Two sheets of paper, and pens and ink, were brought, upon which Mr. Gee said he would not draw the check, for he was sure Mrs. Canning could not be aware of what they were doing. Ultimately Mr. Gee did draw the following check on one of the sheets of paper:—

“12th May, 1834.

“Messrs. Gibson & Co., bankers, Saffron Walden.
Pay Mrs. Canning, or bearer, eight hundred pounds.

“William Gee.”

Edwards then asked for the title deeds of the property, and, on being told by Mr. Gee that he had not got the deeds, Edwards desired him to write and get them. Mr. Gee accordingly wrote a letter, stating that a sum of money was wanted to be advanced on them, and requesting them to be delivered to the bearer. Both these documents were then taken away by Edwards. After this was done, one of the prisoners said, “Let me feel in your pockets.” Mr. Gee said, “Are you going to rob or murder me?” One of them replied, he wanted to see if he had a knife about him. Mr. Gee said he had no knife. He was then asked if he had any money. *Mr. Gee an-*

swered he had 90l. about him. The prisoners then left him, and shortly afterwards came back and had some conversation with Mr. Gee, which was not material. Mr. Gee, after this, having, by extending his chest, contrived to have the chain padlocked rather loosely, slipped his shoulders out of it, and got the rope off his hands and legs. Having made his escape, he went to a police office, and gave information of the circumstance. The police proceeded to the house of Edwards, and, while keeping watch, saw Edwards going towards the house in company with a little girl. The officer went up to him, and asked him if he had seen any thing which had occurred. Edwards replied, "No; I've seen nothing." Afterwards, he admitted that the reason why he had seen nothing that had taken place was because he was blind. The police still kept watching the house, and succeeded in taking the other prisoners into custody. On these facts, *F. V. Lee* submitted, that, even if the prisoner Edwards was entitled to this money by his marriage with Mrs. Canning, it still would be equally an offence for him to obtain it in this mode. But that that marriage did not entitle him to the property, or to any part of it; and, with respect to the fact that Mr. Gee had not any part of the property about his person, that, he submitted, could make no difference.

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PATTESON, J.—Mr. Lee, have you any authority for your last proposition?

F. V. Lee.—No, my Lord; but I would put this case: If a person's life were put in jeopardy by a robber presenting a pistol and demanding his money, it would be no answer to the charge to shew that the prosecutor had in fact no money in his possession.

BOSANQUET, J.—Your position is, supposing that the

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prosecutor's money was demanded when in fact he had no money.

F. V. Lee.—Mr. Gee in this case had other money in his possession.

PATTESON, J.—But the prisoners did not demand the money that Mr. Gee then had.

F. V. Lee.—The demand by force or menaces constitutes the offence, and whether the party has or has not the money in his possession at the time is immaterial.

PATTESON, J.—If a man with menaces demands a sum of money of another, and the person does not give it to him because he has it not with him, the offence is the same; but if it turns out, as in this case, that a sum of money, known to be not then in his possession, was demanded, the case is different. The prisoners do not take any thing from Mr. Gee: they got an order for the delivery of the deeds, and that was all they wanted.

F. V. Lee.—I submit that the prisoners assaulted Mr. Gee with intent to rob him, and that the offence was complete the moment the assault was committed with that view, and that whether Mr. Gee had any money in his possession or not at the time is immaterial under this act of Parliament.

BOSANQUET, J.—I am of opinion, that, under this act of Parliament, the present indictment cannot be sustained.

PATTESON, J.—I am of the same opinion. The prisoners must be acquitted.

Verdict—Not guilty.

Adolphus, Bodkin, and F. V. Lee, for the prosecution.

Prendergast, and *C. Phillips*, for the prisoner *Edwards*.

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Sturgeon, for the prisoner *Laccasagne*.

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Doane, for the prisoner *Weedon*.

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[Attornies—*Makinson & Saunders*, and *Loney*.]

—◆—
REX v. EDWARDS and Others.

INDICTMENT on the statute 7 & 8 Geo. 4, c. 29, s. 6 (a).

The first count charged that the prisoners, on the 12th of May, 1834, with menaces and by force, did feloniously demand of William Gee a certain valuable security for money, to wit, a deed, (describing it by a statement of the date, parties, &c., and also describing it as a deed creating a term of 2000 years in certain lands in Cambridge-shire, to secure a sum of 1200*l.*), with intent the said security from the said William Gee feloniously to steal. The second count was for feloniously demanding the same deed, with menaces, &c., with the like intent. The third count charged that the prisoners did feloniously demand with menaces a certain valuable security for money, which is as follows:—

A. was decoyed into a house and chained down to a seat, and compelled to write an order for the payment of money and an order for the delivery of deeds. The paper on which he wrote remained in his hand half an hour, but he was chained all the time:—Held, that this was not an assault with intent to rob within the stat. 7 & 8 Geo. 4, c. 29, s. 6.

“Messrs. Gibson & Co., bankers, Saffron Walden.

May 12, 1834.

Pay to Mrs. Canning, or bearer, 800*l.*

£800.

“William Gee.”

with intent to steal the same.

Adolphus, for the prosecution, in his opening, stated the facts of the case as follows:—Mr. Canning died at Claver-ing, in Essex, having previously made his will, leaving the interest of a sum of money to his wife so long as she continued alive and a widow, after which it was to go to his

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children. Mrs. Canning was made executrix, and Mr. Bell executor; the former of whom at first only took out letters of administration. Mr. Bell, thinking afterwards that he ought to look after the interest of the testator's children, also took out letters of administration; and, on the property being sold, a sum of 2000*l.* was raised and put out at interest. Mr. Gee was employed professionally by Mr. Bell; and, while Mr. Gee was in possession of the deeds and the money, the scheme of the prisoners and Mrs. Canning was concocted, with the view of getting possession of those deeds. *Adolphus* then stated the obtaining of the order and the draft as opened by *F. V. Lee* in the preceding case; and further stated, that it could be proved, that, when the paper was brought to Mr. Gee, on which he wrote the draft and the letter, both documents remained in his hands for some time, and that it was only owing to threats and menaces he parted with them. It could be shewn, that Mrs. Canning had no right to any part of the property; and that when the prisoner Edwards was brought up to Lambeth-street police office, the Rev. Mr. Mathias, who happened to be present, recognised him as being a person for whom he had performed the ceremony of marriage recently; and also recognised Mrs. Canning as being the female whom he married to Edwards. This, though denied by Mrs. Canning, was, however, placed, by evidence, beyond a doubt.

PATTESON, J.—The same objection applies to this case as to the former. The indictment charges that they did demand, with intent feloniously to steal, &c.

Adolphus.—The case of *Rex v. Phipoe* (a), is, I think, in point.

BOSANQUET, J.—In that case the Judges distinctly decided, that obtaining valuable securities from the maker

(a) Cited ante, p. 110.

by duress was not stealing. In this case the documents were obtained by duress. The question is, whether the documents were ever in Mr. Gee's possession.

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Bodkin.—We can prove that.

C. Phillips.—Not in his peaceable possession; he was in duress at the time.

PATTERSON, J.—The documents are certainly such as the act contemplated. The question is as to the mode in which they were obtained.

F. V. Lee.—The documents, when written by Mr. Gee, remained with him for half an hour or more while he wrote some letters. They were, therefore, in his peaceable possession during that time. He only resigned them on account of the menaces and threats used towards him. There is a difference between this case and that of Mrs. Phipoe, for Mr. Courtois had never the peaceable possession of the note for 2000*l.* which was extorted from him.

PATTERSON, J.—The learned counsel has put his case with great ingenuity, but I am not able to see the slightest difference between the two cases. Mrs. Phipoe held a knife to Mr. Courtois' throat, and compelled him to give a promissory note for 2000*l.* He signed the note, and it was held that it was no robbery; for he never had peaceable possession of it, but had been forcibly and by violence compelled to sign the paper. Now, how does Mr. Gee's case stand? He was chained and padlocked, a rope was put round his neck, and his feet were tied to the ground; he could not move hand or foot, except just to write. They bring him pens, ink, and paper, and he writes the orders. He had the papers, it was true, in his hands; but, chained as he was, is it possible to conceive that he had such a peaceable possession of them as to be at liberty

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to do what he pleased with them? for that is the meaning of peaceable possession. I cannot perceive the difference between the case of Courtois and the present, except that the latter is the stronger case of the two. The ground of the decision in that case must govern the decision of the Court in this. A robbery cannot be committed unless the person has the property in his peaceable possession, to do with it as he chooses. If Mr. Gee had brought the documents ready written, the case would have been different; but he does not write them until he is chained. Several nice and subtle distinctions have been taken, but I do not favour such distinctions; and, therefore, I hold with the previous decision of the Judges, and am bound to be governed by it.

BOSANQUET, J.—I entirely concur in this view of the question. The case is not to be distinguished in principle from Mrs. Phipoe's case. The decision of the Judges in that case was, that it was not a robbery, because Mr. Courtois had never been in peaceable possession of the note; the circumstances are similar in this case, and therefore the jury must acquit the prisoner.

Verdict—Not guilty.

Adolphus, Bodkin, and F. V. Lee, for the prosecution.

Prendergast, and C. Phillips, for the prisoner Edwards.

Sturgeon, for the prisoner Laccasagne.

Doune, for the prisoner Weedon.

[Attornies—*Makinson & Saunders, and Loney*.]

(a) For the report of this and the preceding case we are indebted to the kindness of the learned counsel engaged in them.

OXFORD SUMMER CIRCUIT, 1834.

BEFORE MR. BARON ALDERSON AND MR. JUSTICE WILLIAMS.

BERKSHIRE ASSIZES.

BEFORE MR. BARON ALDERSON.

1834.

DOE on the Demise of HIGGS and Others *v.* COCKELL.

July 11th.

EJECTMENT by the lessors of the plaintiff as churchwardens and overseers of the poor of the parish of St. Mary, Reading, to recover a messuage situate in Castle-street, in Reading.

Upon the trial of an ejectment brought by churchwardens and overseers to recover a house alleged, on the part of the lessors of the plaintiff, to be a parish house, a rated inhabitant of the parish is a competent witness for the plaintiff, under the stat. 54 Geo. 3, c. 170, s. 9.

It was opened by *Talfourd*, Serjt., for the lessors of the plaintiff, that this house had originally belonged to the abbey at Reading, and that it afterwards belonged to the churchwardens of the parish of St. Mary in trust to apply the rents of it in aid of the church rates of that parish, and that the present lessors of the plaintiff sought to recover the possession of the house as a parish house, under the stat. 59 Geo. 3, c. 12, although, some years before the passing of that act, the churchwardens then in office had granted a lease to a person under whom the defendant claimed; it being contended that churchwardens, not being a body corporate, had no power to grant a lease. He cited the cases of *Doe d. Hiley v. Jackson* (a), and *Phillips v. Pearce* (b).

If the opposite party be called on to produce a paper (under a notice to produce), he must either produce it when called for, or not at all, and he cannot, after having refused to produce it, put it into a witness's hand, at a later period of the cause, to ask him at what time an interlineation was made in it.

(a) 10 B. & C. 885. In that case it was held, that all lands belonging to a parish are vested in the churchwardens and overseers by the stat. 59 Geo. 3, c. 12, not merely where the profits are applicable to the relief of the poor,

but also where the proceeds are to go in aid of the church rates only, and although such lands had been originally vested in trustees for the benefit of the parish.

(b) 5 B. & C. 433; and 8 D. & R. 43. In that case it was held,

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ALDERSON, B.—The lease in the case of *Phillips v. Pearce* was subsequent to the stat. 59 Geo. 3, c. 12, and here the lease was antecedent to the statute. The question therefore is, whether, in this case, the statute vested any thing but the reversion in the lessors of the plaintiff.

On the part of the lessors of the plaintiff, Mr. Hall was called; he stated that he was an occupier of rateable property in the parish.

Ludlow, Serjt., for the defendant.—I submit that this witness is not competent. His evidence tends to diminish his own liabilities.

Talfourd, Serjt., relied on the stat. 54 Geo. 3, c. 170, s. 9 (a).

that, since the stat. 59 Geo. 3, c. 12, churchwardens *alone* cannot make a lease of a parish house, or of parish land. And in the case of *Woodcock v. Gibson*, 6 D. & R. 524, and 4 B. & C. 462, it was held that the person in whom parish houses, &c. are vested are the churchwardens and overseers *jointly as a body corporate*. In the case of *Doe d. Grandy v. Clarke*, 14 East, 488, (which was decided before the statute), where a pauper had been put into possession of a cottage forty years ago, by the then existing overseers of the poor, and had continued in the parish pay, and the cottage had been from time to time repaired by different overseers till two years ago, when the pauper disposed of it to the defendant; it was held that the existing overseers could not maintain ejectment for it, having no derivative title as a corporation from their predecessors, so as to

connect themselves in interest with the overseers by whom the pauper was put in possession, and the pauper having done no act to recognise his holding under the demising overseers.

(a) By which it is enacted, "that no inhabitant or person rated or liable to be rated to any rates or cesses of any district, parish, township, or hamlet, or wholly or in part maintained or supported thereby, or executing or holding any office thereof or therein, shall, before any court or person or persons whatsoever, be deemed and taken to be by reason thereof an incompetent witness for or against such district, parish, township, or hamlet, in any matter relating to such rates or cesses; or to the boundary between such district, parish, township, or hamlet, and any adjoining district, parish, township, or hamlet; or to any order of removal to or from such district, parish, township, or ham-

ALDERSON, B.—That statute says, that the party shall not be incompetent in any matter relating to rates or cesses. Now the only way in which his interest can be affected is by his evidence tending to recover property, the proceeds of which will diminish the rates and cesses.

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Ludlow, Serjt., submitted that the witness's evidence related to the recovery of certain property, and not to any thing respecting either rates or cesses; and he cited the case of *Oxenden v. Palmer* (a).

ALDERSON, B.—I think he is a competent witness.

The witness was examined.

On the part of the lessors of the plaintiff, a receipt for rent in the possession of the defendant was called for, under a notice to produce.

let; or the settlement of any pauper in such district, parish, township, or hamlet; or touching any bastards chargeable or likely to become chargeable to such district, parish, township, or hamlet; or the recovery of any sum or sums for the charges or maintenance of such bastards; or the election or appointment of any officer or officers, or the allowance of the accounts of any officer or officers of any such district, parish, township or hamlet; any law, usage, statute or custom to the contrary in any wise notwithstanding."

(a) 2 B. & Ad. 236. In that case it was held that a person who pays highway rates within a parish is not rendered a competent witness by the 54 Geo. 3, c. 170, s. 9, upon the trial of an issue, whether within that parish there is a custom that all persons re-

siding therein, whose duty it is to cause the highways within the parish to be repaired, may take shingle from the sea-beach for the purpose of such repair, the custom not being a matter relating to rates or cesses within the meaning of the act. In this case the Court express a doubt as to the authority of the case of *Meredith v. Gilpin*, 6 Price, 146, where, in an action of trespass against overseers to determine whether lands were vested in them under a local act of Parliament, the Court held that the inhabitants were competent witnesses. In the case of *Marsden v. Stansfield*, 1 M. & R. 669, it was held that, upon the trial of an issue, whether a tenement is situate within the chapelry of B., a witness occupying rateable property in B. is competent to prove the affirmative.

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Ludlow, Serjt., declined to produce it.

ALDERSON, B.—You must either produce it at once or never.

A witness gave parol evidence of the contents of the receipt.

Ludlow, Serjt., then put the receipt into the witness's hand, and proposed to ask him when an interlineation which appeared on the face of it was made.

ALDERSON, B.—I think that you cannot now be allowed to produce the receipt, as you before refused to do so. You must either produce a document when it is called for or never. If a document be called for and you produce it, it is subject to all objections, and you might have then examined as to the interlineation; but if you refuse to produce it, you must take the consequences of such refusal (a).

The question was not put.

Verdict for the plaintiff, subject to a special case on the question, whether, if churchwardens, having a house vested in them in aid of the church rate, and before the stat. 59 Geo. 3, c. 12, make a lease of it, that statute gives the parish officers any thing more than the reversion.

Talfourd, Serjt., and *Justice* for the lessors of the plaintiff.

Ludlow, Serjt., and *Talbot* for the defendant.

[Attornies—*Weedon* and *Vines*.]

(a) See the cases of *Rex v. Woodman*, ante, p. 206, and *Doe v. Fursey*, ante, p. 81; *Brown v. d. Coyle v. Cole*, post.

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July 12th.

FRANKUM v. Earl of FALMOUTH and Another.

CASE.—The declaration stated, that the plaintiff, before and at the times of committing the grievances, was possessed of a certain water grist mill, situate at Woolhamp-ton, and that, *by reason thereof*, ought to have and enjoy the water of a certain stream, which of right ought to have run and flowed to the said mill to supply the same with water for working the same, yet the defendants, wrongfully intending &c., wrongfully diverted large quantities of the water. Pleas—*first*, not guilty; *second*, that the plaintiff ought not, by reason of the possession of the said mill, to have had and enjoyed the benefit of the water so diverted; *third*, that the earl was seised of land contiguous to the said stream at a higher part of it than the said mill, and because the water was penned back by the said plaintiff, and by reason thereof flowed injuriously through the said lands, the defendants therefore diverted it; *fourth*, that the water which was diverted ought not to have run and flowed to the mill. The second and fourth pleas concluded to the country; the third plea concluded with a verification. Replication to the third plea, that the water was not injuriously penned back by the plaintiff.

It appeared, that, in the year 1808, Mr. George Frankum, the father of the plaintiff, had purchased the lands on both sides of the stream, at that part of it at which the present mill stood, and that soon afterwards he erected a small water-wheel in a side cut made by him from the stream for that purpose—this wheel turning a grindstone for the grinding of tools; and that, about the year 1816, he erected a small mill for the grinding of malt, this latter mill being on the main stream; and that, in the year 1820, he caused the present water grist mill to be erected. Mr.

If water has been accustomed to flow along a channel from time immemorial, and it has been unappropriated, the first owner of the adjoining lands on both sides who appropriates it, without doing any injury to any one, either above or below him, acquires such a right by his appropriation, that though he may not have enjoyed it for twenty years, he may maintain an action against any owner of the lands above him who wrongfully diverts the water from its ancient channel.

If a party, who has a right to the use of running water, as an owner of adjoining lands, has appropriated it, and by his declaration claim the right to it as the owner of a mill not twenty years old, this is bad, and the Judge at the trial will not allow it to be amended; and even if the jury find the plaintiff's right specially,

and it be indorsed on the postea under the stat. 3 & 4 Will. 4, c. 42, s. 24, the Court above will not give judgment for the plaintiff on that finding, because if the plaintiff had stated his right properly, the defendant might have pleaded differently.

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George Frankum died in the year 1830, and the plaintiff, his eldest son, succeeded him in the ownership and occupation of the lands and mill. It was admitted, on the part of the defendants, that the water had been diverted by their order.

Talfourd, Serjt.—I submit that the plaintiff must be nonsuited. He claims this water in respect of his mill, which is not twenty years old.

Curwood, for the plaintiff.—If a party has appropriated water which has flowed unused by any one in its ancient channel, he may maintain an action against any person who diverts it, although he may not have appropriated it for twenty years. That was held in the case of *Mason v. Hill* (a).

Talfourd, Serjt.—I do not deny, that, if a party has land on both sides of the stream, he may put a mill across it; but here the plaintiff does not claim a right to the water as the owner of the land; he claims his right as owner of the mill, in respect of which he has in reality no right to it at all.

ALDERSON, B.—If water has been accustomed to flow along a channel from time immemorial, and it has been unappropriated, the first owner of adjoining lands on both sides of it, who appropriates it without doing any injury to any one either above or below him, acquires such a right by his appropriation, that, though he may not have enjoyed his appropriation for twenty years, he may maintain an action against any owner of the lands above him who wrongfully diverts the water from its ancient channel (b). I have no doubt about the law on this subject, but the

(a) 3 B. & Ad. 304.

(b) For the law respecting the right to water, see the very cla-

borate judgment of Lord Denman, in the case of *Mason v. Hill*, 2 N. & M. 747.

plaintiff here has claimed a different right from that which he has; he should have claimed the right in respect of his land, and not in respect of his mill.

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Curwood applied to amend under the statute 3 & 4 Will. 4, c. 42, s. 23 (a).

(a) By which it is enacted, "that it shall be lawful for any court of record holding plea in civil actions, and any Judge sitting at Nisi Prius, if such Court or Judge shall see fit so to do, to cause the record, writ, or document on which any trial may be pending before any such Court or Judge, in any civil action, or in any information in the nature of a quo warranto, or proceedings on a mandamus, when any variance shall appear between the proof and the recital or setting forth, on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such Court or Judge, not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the Court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such Court or

Judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such Court or Judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such Court or Judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such Court or Judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea or the writ, as the case may be, and returned together with the record or writ, and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any Court of Record, then the order

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ALDERSON, B.—I will not stop the cause; and I will ask the jury to find the facts, which I will indorse on the postea, and the Court may then, if they think proper, give judgment under the 24th section of the statute (a).

The case was proceeded in on the question raised by the third plea, whether the keeping up a head of water at the plaintiff's mill was or was not the cause of the Earl of Falmouth's lands having been overflowed on several occasions, spoken to by the defendants' witnesses.

The jury found, "that the act of the defendants had been injurious to the plaintiff's right to the water, as it existed before the plaintiff's mill was erected, and that the water was not turned back by the plaintiff injuriously to Lord Falmouth's lands;" and they found the damages to be 25*l*.

ALDERSON, B.—I think, as the plaintiff has claimed his right in a wrong manner, I ought to nonsuit him.

for amendment shall be entered on the roll or other document upon which the trial shall be had; provided that it shall be lawful for any party who is dissatisfied with the decision of such Judge at Nisi Prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the Court from which such record or writ issued for a new trial upon that ground, and in case any such Court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the Court shall think fit, or the Court shall make such other order as to them may seem meet."

(a) By which it is enacted, "that the said Court or Judge shall and

may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said Court or the Court from which the record has issued shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case."

Carrington, for the plaintiff, submitted that there must be a verdict entered, and not a nonsuit; as, the finding of the issue on the third plea being in favour of the plaintiff, he would be entitled to the costs of that issue, which, from the number of witnesses on it, would be very considerable.

ALDERSON, B.—No doubt that is so. There must be a verdict for the plaintiff on the general issue and on the third plea, and for the defendant on the second and fourth pleas.

His Lordship directed the verdict to be entered accordingly, and the special finding to be indorsed on the postea. But, being afterwards of opinion, that, under the general issue, the plaintiff would have had to have proved his right as well as the injury, the jury finding a different right from that claimed, his Lordship subsequently directed the verdict on the general issue to be entered for the defendant, and the special finding to be indorsed on the postea in the following terms, which was accordingly done:—

“And the jury also find, that the defendants wrongfully and injuriously diverted and turned, and caused and procured to be diverted and turned, divers large quantities of the water of the stream, in the declaration mentioned, from and out of the usual, accustomed, and proper course and channel thereof, and also hindered and prevented a large part of the said stream of the said watercourse from running and flowing as it ought to have done in and along its usual, accustomed, and proper course and channel, and from supplying water necessary for the proper enjoyment of the plaintiff’s premises as they existed before the plaintiff’s mill was erected, and thereby injured the same; and they assess the damages at 25*l*.”

Curwood, Justice, and Carrington, for the plaintiff.

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Talfourd, Serjt., *R. V. Richards*, and *Yates*, for the defendants.

[Attornies—*C. Ford*, and *Faulkner*.]

IN the ensuing term, *Justice* moved for a rule to shew cause why the pleadings should not be amended by the substitution of a claim of the plaintiff's right in respect of his land instead of in respect of his mill; or why the Court should not give judgment for the plaintiff on the special finding under the 24th sect. of the stat. 3 & 4 Will. 4, c. 42. But the Court refused a rule, on the ground that the defendants might have been misled by the mode of the plaintiff's pleading; and that the issues might have been different if the declaration had claimed the right in respect of the land, instead of in respect of the mill.

Justice then applied to have the verdict entered for the plaintiff on the general issue, on the ground, that, since the rule of Court of H. T. 4 Will. 4, which relates to pleading in actions on the case (*a*), the general issue in cases

(*a*) By this rule it is ordered, that, in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant—and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. *Ex. gr.* In an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as

to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house; in an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods. In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, pro-

like the present merely puts in issue the doing of the act by the defendant, and admits the right in which the plaintiff sues. On this point the Court granted a rule to shew cause why the verdict should not be so entered, without damages, Mr. Justice *Patteson* observing, that the plaintiff was not entitled to the 25*l.* damages, as those damages were given for the injury to the right the plaintiff claimed by his declaration. This rule after argument was made absolute.

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fession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office or being of the profession or trade alleged. In actions for an escape, it will operate as a denial of the neglect or default of the sheriff, or his officers, but not of the debt, judgment, or preliminary proceed-

ings. In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire; or of the purpose for which they were received.

—◆—
REX v. STROUD.

July 11th.

SHEEP-STEALING.—The indictment charged the prisoner with stealing "one sheep, the property of John Pocock the elder."

In an indictment for sheep-stealing, a rig sheep is properly described as "one sheep."

It was doubtful on the evidence whether the animal stolen was a rig sheep or a wether.

ALDERSON, B.—It is quite immaterial whether this sheep was a rig or a wether, as the prisoner would be equally liable to be convicted on this indictment whether it was one or the other.

Verdict—Guilty.

J. Jeffries and Williams, for the prosecution.

Carrington, for the prisoner.

[Attornies—*Baker*, and *Knight*.]

See the case of *Rex v. Birket*, ante, Vol. 4, p. 216.

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BEFORE MR. JUSTICE WILLIAMS.

REX v. LEE and SCOTT.
July 15th.

A., a lad, who was a clerk in a banking-house, robbed his employers, and after doing so, he went to the lodgings of B., who was much older than himself, and who had relations in America. A. stayed twenty minutes at B.'s lodgings, and after that, on the same night, A. and B. started together by the coach, and went from Reading to Liverpool, intending to embark for America:—Held, that on this evidence B. might be convicted as an accessory after the fact in harbouring, receiving, and maintaining the principal felon.

THE prisoner Lee was indicted for stealing eleven 10l. promissory notes and eleven pieces of paper in the dwelling-house of Messrs. Stephens & Co.; and the prisoner Scott was charged as an accessory after the fact, it being charged that he did after the felony, and knowing of it, “harbour, receive, and maintain” the prisoner Lee (a).

It appeared that the prisoner Lee, who was a lad of seventeen years of age, and whose family lived in Reading, was a clerk in the banking-house of Messrs. Stephens at that place, and that the other prisoner was aged twenty-three, his family having gone to reside in America. It was proved, that, for some time before the 21st of June, 1834, when the felony was committed, the prisoner Lee was in the daily habit of coming to the room of the prisoner Scott, and that he did so on the evening of the 21st of June, after the banking-house had closed, and consequently after the stealing of the notes, and stayed twenty minutes. It further appeared, that, on that evening, the two prisoners proceeded together in the stage-coach to Bristol, and after that by the mail to Liverpool, where both the prisoners were apprehended, each of them having a number of Spanish dollars in his possession. It appeared that the places in the coaches for both prisoners were paid for by the prisoner Lee.

The prisoner Lee had made a confession in writing; and it was also proved that the prisoner Scott said, that they were going to America.

(a) By s. 61, stat. 7 & 8 Geo. 4, c. 29, (the Larceny Consolidation Act), it is enacted “that every accessory after the fact to any felony punishable under this act,

except only a receiver of stolen property, shall, on conviction, be liable to be imprisoned for any term not exceeding two years.”

Carrington, for the prisoner Scott.—I submit that there is neither harbouring, receiving, nor maintaining proved in this case. I apprehend that harbouring means concealing the felon, and so does receiving; and with respect to the term “maintaining,” it appears here, that, so far from the supposed accessory maintaining the principal, the converse was the case, as Lee appears to have paid the coach hire of the other prisoner. It is true, that the prisoner Lee was for twenty minutes in the room of the prisoner Scott; but there is no evidence that at that time Scott had any knowledge of the commission of the felony. This is not an indictment for receiving stolen goods, but for harbouring the felon, which is not at all a usual form of indictment. There was, however, a case of this kind tried at Gloucester, before Mr. Baron *Vaughan*, where a person was indicted for murder, and his son was indicted for harbouring him. It appeared that they lodged together, and that the father paid the rent, and that after the murder the father went to the lodging, and this the learned Baron held was no harbouring by the son.

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WILLIAMS, J.—At all events there is evidence to go to the jury.

The prisoners were called on for their defence.

WILLIAMS, J., (in summing up).—In considering the question, whether the prisoner Scott is guilty of receiving, harbouring, and maintaining the prisoner Lee, you ought to look at the relative situations of the parties. You find that Lee is a boy who is connected with Reading in the most intimate manner, and that he being a clerk in a banking-house is frequently going to the room of Scott, who is a man whose friends are in America. You next find that the banking-house is robbed, and that the two prisoners go off together, evidently on their way to America. It is for you to say whether the elder prisoner

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did not suggest to the younger that he would not only aid his escape to America, but go off with him; and is it not manifest that the boy was encouraged by the man? This is the converse of the case mentioned by the learned counsel; there the father was considered (and no doubt properly) to have been the superior person, and the son but subordinate to him. But in the present case you will say whether the prisoner Scott did not harbour, receive, and maintain the boy Lee after he knew that he had stolen these notes for their joint purpose of going to America together.

The jury found both the prisoners guilty.

Talbot and *Cripps*, for the prosecution.

Curwood, for the prisoner Lee.

Carrington, for the prisoner Scott.

[Attornies—*Vines* for the prosecution; *Whitley* and *Knight* for the respective prisoners.]

(*Civil Side.*)

BEFORE MR. JUSTICE WILLIAMS.

July 16th.

DOE on the Demise of *TRANTER v. WING.*

A., thirty years ago, died seised of a cottage, having a son B. and a daughter C. At his death C., his daughter, then unmarried, took possession of it, and afterwards married D., and after his death W. After her death, W. remained in possession sixteen years:—Held, that the son of B., who was the heir of C. as well as being the heir of A. and B., might recover in ejectment, although W., including the term he had occupied the cottage with his wife, had had more than twenty years' possession of it.

EJECTMENT for a cottage.

It appeared that the cottage had belonged to Edward Tranter, the grandfather of the lessor of the plaintiff, who had died about thirty years ago; and that the father of the lessor of the plaintiff was never in possession of it, it being taken possession of on the death of Edward Tranter by

After her death, W. remained in possession sixteen years:—Held, that the son of B., who was the heir of C. as well as being the heir of A. and B., might recover in ejectment, although W., including the term he had occupied the cottage with his wife, had had more than twenty years' possession of it.

his daughter, who continued in possession all her life. She, in the year 1790, married a person named Butler, who died in the year 1801; and, in the year 1807, she married the defendant, who survived her; she died in the year 1818, never having had any child by either marriage. The defendant had held the cottage more than twenty years, including the time he lived in it with his wife. The lessor of the plaintiff was the heir-at-law of Mrs. Wing, the daughter of Edward Tranter.

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Talfourd, Serjt., for the defendant, submitted that there was more than twenty years' adverse possession against the lessor of the plaintiff, as the title under which he claimed accrued on the death of his grandfather.

Curwood, contra.—If Mrs. Wing's occupation was originally permissive, there is no adverse possession till her death, sixteen years ago, when there was an adverse possession in the defendant. If Mrs. Wing's possession was adverse from the first, she gained a right of possession, and the defendant during her life enjoyed the property *jure uxoris*, and, that being so, at her death, it descended to the lessor of the plaintiff, as her heir-at-law.

WILLIAMS, J.—I think that the defendant, while occupying the property in his wife's lifetime, which he got possession of by marrying her, could not be said to have held an adverse possession against her heir-at-law. The lessor of the plaintiff is entitled to a verdict.

Verdict for the plaintiff.

Curwood and *Carrington*, for the lessor of the plaintiff.

Talfourd, Serjt., for the defendant.

[Attornies—*Bartlett*, and *Nash*.]

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(Crown Side.)

BEFORE MR. BARON ALDERSON.

July 18th.

REX v. SIMONS.

A., who was a witness for the prosecution against B., on a charge of arson, had first been examined by the magistrate before any specific charge was made against any person, and his deposition taken in writing. A. was next accused of the offence, and his statement as a prisoner was also taken down by the magistrate. After this B. was charged with the offence, and A. examined as a witness, when A.'s statement made at that time was taken down, B. being then committed:—Held, that all these statements of A. so taken down ought to be returned to the Judge, and not merely the statement made when B. was committed.

What a prisoner is overheard to say to his wife, or even what he is overheard to say to himself, is receivable in evidence against him on a charge of felony.

BURNING.—The prisoner was charged with having set fire to a barn, the property of John Davis.

A witness named Nichols was called to prove certain declarations, which he alleged were made to him by the prisoner before the fire. It appeared from the cross-examination of this witness that he was examined before Mr. Lechmere, the magistrate, several times; at the first examination no person was specifically charged with the offence, but what he said was then taken down in writing. It further appeared that this witness was taken into custody, and while in custody as an accused person he made another statement, which was also taken down by the same magistrate; and that on a subsequent day the present prisoner having been apprehended, he (the witness) was again taken before the same magistrate, and examined as a witness; and that upon that day the prisoner was committed. The object of this cross-examination was to shew that this witness had told three different stories.

ALDERSON, B.—I have none of these depositions but the last, which was taken when the prisoner was committed. I had no idea of these previous depositions till I heard Mr. *Carrington's* cross-examination. Every one of them ought to have been returned to me, as it is of the last importance that the Judge should have every deposition that has been made, that he may see whether or not the witnesses have at different times varied their statements, and, if they have, to what extent they have done so. Magistrates ought to return to the Judge all the depositions

that have been made at all the examinations that have taken place respecting the offence which is to be the subject of a trial.

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SIMONS.

It was proposed to call a witness to prove what he overheard the prisoner say to his wife, as the prisoner was leaving the magistrate's room after his committal.

Carrington.—It is hardly fair to examine as to what a man was overheard saying to his wife.

ALDERSON, B.—What a person is overheard saying to his wife, or even saying to himself, is evidence.

The witness stated that he overheard the prisoner say to his wife, "Keep yourself to yourself, and don't marry again."—To confirm this evidence another witness was called, who overheard at the same time what the prisoner said to his wife, and he stated the words to be—"Keep yourself to yourself, and keep your own counsel."

ALDERSON, B.—One of these expressions is widely different from the other. It shews how little reliance ought to be placed on such evidence (*a*).

Verdict—Not guilty.

M'Lean, for the prosecution.

Carrington, for the prisoner.

[Attornies—*Field*, and *Looker*.]

(*a*) See the observations of Mr. Justice *J. Parke*, contained in the note to the case of *Earle v. Picken*, ante, Vol. 5, p. 542.

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WORCESTER ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE WILLIAMS.

July 19th.

HEMING v. ENGLISH.

A. had let a horse and gig to B. for a journey. B. afterwards desired C. to drive it back for him, and return it to A.; as C. was doing so, the defendant negligently drove his gig against the horse of A. and killed it:—Held, that, in action brought by A. for the injury to his reversionary interest in the horse, C. was not a competent witness for the plaintiff without a release.

At a trial an interested witness was examined, on the attorney for the party examining him undertaking to give him a release. After the trial the attorney refused to release the witness:—Held, that the witness might compel the attorney to give him a release, but that this refusal was no ground for the Court granting a new trial.

CASE.—The declaration stated that the plaintiff had let a horse and gig to a person named Hancock, and that during such letting the defendant negligently drove his gig, whereby the plaintiff's horse was killed, to the injury of the plaintiff's reversionary interest therein. Plea—General issue.

It appeared that the plaintiff, who lived at Worcester, had let his horse and gig to Mr. Hancock, of Feckenham, who had taken them from Worcester to Feckenham, and that Mr. Wilson being at Feckenham on a visit, he was desired by Mr. Hancock to drive the horse and gig back again to Worcester, to return them to the plaintiff. It was opened, that, as Mr. Wilson was proceeding with the horse and gig to Worcester, the defendant's gig was coming in an opposite direction, and, the night being very dark, the shaft of the defendant's gig was driven into the breast of the plaintiff's horse, whereby the animal was killed.

R. V. Richards, for the plaintiff, proposed to call Mr. Wilson to prove how the accident had happened.

Talfourd, Serjt., for the defendant.—I submit that Mr. Wilson is not a competent witness without a release.

R. V. Richards.—I recollect that in an action against the captain of a steamer, for running down another vessel,

the mate, who was in command, was examined as a witness without a release.

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WILLIAMS, J.—This case is unlike any that I remember to have occurred before. I think that a release ought to be given.

The plaintiff's attorney undertook to release the witness, and he was examined.

The case was left to the jury on the question, whether the defendant was or was not driving on the wrong side of the road.

Verdict for the plaintiff.

R. V. Richards and *Godson*, for the plaintiff.

Talfourd, Serjt., and *F. V. Lee*, for the defendant.

[Attornies—*Pumfrey*, and *Robeson*.]

(a) See the cases of *Mitchell v. Hunt*, ante, p. 351; and *Harrington v. Caswall*, ante, p. 352.

COURT OF EXCHEQUER.—BEFORE LORD LYN-
HURST, C. B., PARKE, B., ALDERSON, B., AND GURNEY, B.

F. V. Lee applied for a rule to shew cause why there should not be a new trial, on the ground that the plaintiff's attorney had, since the trial, refused to give a release to Mr. Wilson; and he submitted that, as the verdict for the plaintiff proceeded on the evidence of Mr. Wilson, who was an interested witness, the Court ought to set it aside.

Nov. 10th.

Lord LYNTHURST, C. B.—Their refusal to give a release is not a question between the parties, but between one party and the witness. If one of the parties has agreed

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to give the witness a release, the witness may compel him to fulfil his agreement.

PARKE, B.—You put it, that, as the party agreed to give a release, and did not, the verdict is founded upon the evidence of an interested witness, and, as you say, therefore improperly obtained by the plaintiff.

F. V. Lee.—Exactly so, my Lord ; I put it, that, if this evidence, which they were not entitled to give, on the ground of Mr. Wilson's interest, had been struck out, the plaintiff would not have had a verdict.

ALDERSON, B.—The witness may compel them to give him a release : they were to release him, and not you.

LORD LYNTHURST, C. B.—In consideration that you would allow the witness to give evidence, they undertook to give him a release.

PARKE, B.—The witness was as free from bias as if he had been released.

ALDERSON, B.—Nobody is defrauded, but the king's revenue may suffer.

LORD LYNTHURST, C. B.—As there is an agreement for a release, which the witness may compel them to execute, this is no ground for disturbing the verdict.

F. V. Lee then applied to set aside the verdict as being against the weight of evidence ; but the Court, after conferring with *Williams, J.*, refused a rule.

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STAFFORD ASSIZES.

(Civil Side.)

BEFORE MR. BARON ALDERSON.

COOPER v. WHITEHOUSE and Others.

July 23rd.

DEBT for work and labour as a dissenting minister. Plea—That the defendants never were indebted in manner and form as in the declaration alleged (a).

A witness was called to prove that the plaintiff performed the duty of minister at the chapel at Coseley, in the parish of Sedgley.

Ludlow, Serjt., proposed to cross-examine this witness as to the conduct of the plaintiff as minister.

ALDERSON, B.—This plea of *nil debet* merely denies the contract (a).

Maule.—If it was an express contract, that would be so; but, as this is an action of debt, merely on an implied contract, I apprehend that we may go further.

ALDERSON, B.—You may prove that the work was done under such circumstances as shew that there was no implied contract to pay any thing. I do not think that upon this plea you can go into evidence of misconduct, unless it be such as to shew that there was no implied contract to pay the plaintiff for his services. If the plaintiff was

In an action of debt for work and labour on an implied contract, the defendant, on the plea that he never was indebted, may go into evidence to prove that the work was done under such circumstances as shew that there was no implied contract to pay any thing; but upon this plea the defendant cannot go into evidence of misconduct, except such as goes to shew that there was no implied contract to pay.

If a dissenting minister be appointed minister of the chapel by a part of the trustees of it, he cannot maintain an action against all the trustees for his salary; and the fact of all of them having

signed a notice to him, demanding the possession of the chapel, will not make any difference.

If one sue several defendants in debt, and the evidence do not fix all the defendants, the plaintiff must be nonsuited, and the Judge will not allow the declaration to be amended by striking out the names of those defendants who are not affected by the evidence.

(a) As to this plea see the Rules on Pleading of Hilary Term, 4 Will. 4.

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employed by the defendants under circumstances which shew that he was to be paid, I cannot allow you to go into proof of misconduct, unless you dismissed him. If the plaintiff was guilty of misconduct, and you did not put an end to the contract when you might, and he continued to perform the work, he will be entitled to be paid for it.

Evidence was given to shew that all the defendants had joined in engaging the plaintiff as a minister of the chapel, except two of them, Mr. Jeavons and Mr. Lewis, who both lived at great distances from the chapel, and did not appear to have been there during the ministry of the plaintiff.

A notice, signed by all the defendants, was put in. It stated them to be surviving trustees of the chapel, and by it the defendants demanded of the plaintiff to give up the possession of it.

ALDERSON, B.—What evidence have you to fix Mr. Jeavons and Mr. Lewis.

Talfourd, Serjt.—They join in the notice demanding the possession of the chapel.

ALDERSON, B.—All the trustees must do that to dismiss the plaintiff from the chapel; but still these two defendants might not have joined in the hiring, and there is certainly not the slightest evidence that they did so.

R. V. Richards asked to amend the declaration, by striking out the names of these two defendants.

ALDERSON, B.—Oh, no—you must not do that. You must fix all the defendants, and if you cannot you must be nonsuited.

Nonsuit.

Talfourd, Serjt., and *R. V. Richards*, for the plaintiff.

Maule, for two of the defendants.

Ludlow, Serjt., and *Whateley*, for the other defendants.

[Attornies—*Fryer*, and *Willim.*]

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The following case having reference to the effect of the plea of *nil debet*, we have subjoined it.

COURT OF KING'S BENCH.—BEFORE LORD DENMAN, C. J.,
TAUNTON, PATTESON, AND WILLIAMS, JS.

EDMUNDS v. HARRIS.

Nov. 25th.

DEBT for goods sold and delivered. Plea—that the defendant “never was indebted in manner and form as in the declaration alleged.”

The trial was before the sheriff of Middlesex, and the defence was, that the goods were sold on a credit which had not expired when the action was brought.

Mansel, for the defendant, went into evidence to substantiate this defence, which the under-sheriff at first received, but afterwards rejected, telling the jury that they were not to take it into their consideration. The jury found for the plaintiff; and *Mansel* afterwards obtained a rule to shew cause why there should not be a new trial, on the ground that the evidence was properly receivable on this plea.

If in debt for goods sold the defence be that the goods were sold on a credit not expired at the time of the bringing of the action, this must be specially pleaded.

Busby, in shewing cause, submitted that this defence ought to have been put upon the record. The object of the rules of pleading of H. T. 4 Will. 4, being to apprize the plaintiff of the intended defence, such as payment at the time of delivery, bill of exchange not due till after the action, or the like.

Mansel, in support of the rule, argued that the allegation in a declaration in debt, “whereby an action hath accrued,” imported a present right of action, and that therefore the plea denied that present right.

The Court held, that, if the defendant meant to insist that the goods

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were sold on a credit not expired at the time of the bringing of the action, he could only do so by pleading it specially, and that he could not go into that defence on a plea such as was pleaded in the present case.

Rule discharged.

July 19th.

WOODWARD v. LANDER, Clerk.

A letter written to the postmaster-general, or to the secretary to the General Post-office, complaining of misconduct in a postmaster, is not a libel, if it was written as a *bond fide* complaint to obtain redress for a grievance that the party really believed he had suffered; and particular expressions are not to be too strictly scrutinized, if the intention of the defendant was good.

LIBEL.—Pleas, *first*, general issue; *second*, a justification as to a part of the libel. Replication, denying the justification.

It was opened by *R. V. Richards* for the plaintiff, that the plaintiff was the postmaster of Rugely, and had also been a mercer, but that he had been unfortunate in trade, although he still continued in the situation of postmaster, respecting which the defendant had written a letter to Sir Francis Freeling, the secretary of the Post-office, who, after instituting an inquiry, had, by the direction of the Duke of Richmond, who was postmaster-general, caused the letter of the defendant to be delivered to the plaintiff. This letter was the libel. It was read, and was to the following effect:—

“May 6, 1833.

“Sir,—It is painful to me to make complaints, but I trust you will not think the present complaint frivolous. I reside two miles from Rugely, and send daily thither purposely for letters, and always send money enough to pay postages. On the present occasion it happened (which was very unusual) that I had three letters—one double, the postage of which was 1*s.* 8*d.* I sent 1*s.* 10*d.* only, and the postmaster or mistress would not let my servant have it without the postage being paid, though he said I should be by to-morrow, and pay for them. I have resided upwards of twenty years near Rugely, where I spend a great part of my income; and any tradesman, even

Woodward himself, would give me credit for more in pounds than this amounted to in pence. This is his retaliation for a complaint I once made against him, but I have suppressed several. His office is most negligently kept. The letter-box is closed an unreasonable time, and letters are continually denied which are there, and it is by all persons that I have heard speak of it complained of as a bad branch of your beautiful establishment.

"Is he entitled to charge a penny for a letter put in by a townsman? Is 1s. 8d. the postage of a double letter from London? I should make no inquiry of this sort if I did not think the man capable, from his conduct to his creditors, of fraud."

(Signed by the defendant).

The defendant.—May I go through the criminal items in the declaration.

ALDERSON, B.—You may, under the plea of the general issue, shew that you did not publish the libel, or that you published it under such circumstances as will make it a protected communication.

The defendant.—Our intercourse with the post-office is compulsory; and are we not to be allowed to make complaints of even imaginary grievances?

ALDERSON, B.—You had a right to make a complaint; and the only question is, whether in writing this letter you have exceeded the bounds of a fair and honest complaint?

The defendant addressed the jury, but did not go into any evidence in support of the plea of justification.

ALDERSON, B., (in summing up).—Even if this letter, which was written by the defendant, be a libel, it does not

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follow that there should be a verdict for the plaintiff; for, if it was written as a *bond fide* complaint, made to obtain redress in the proper quarter, the defendant would be entitled to a verdict, although the contents of the letter may not be strictly true. The question is then, was this letter written *bond fide* to a person whom the defendant believed to have the power of giving him redress for a grievance that he really believed he had suffered? If the defendant believed that he had suffered an injury by the conduct of the plaintiff as postmaster, he had a right to make his complaint to the Duke of Richmond, or Sir Francis Free-ling; but the defendant would not thereby be justified in introducing irrelevant matter to the injury of the plaintiff's character. This is not strictly what is called a privileged communication, but is rather a communication privileged by the occasion; and, if it was made *bond fide*, the particular expressions ought not to be too strictly scrutinized, provided the intention of the defendant was good; but if the concluding part of the letter was introduced gratuitously to injure the plaintiff's character, the plaintiff will be entitled to recover.

Verdict for the plaintiff—Damages, 10*l*.

R. V. Richards, and *Whateley*, for the plaintiff.

The defendant in person.

[Attornies—*Horton & Cope*, and *Lander*.]

See the cases of *Cockayne v. Hodgkinson*, ante, Vol. 5, p. 543, and *Warr v. Jolly*, ante, p. 497.

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July 23rd.

ROWLINSON *v.* ROANTRE.

ASSUMPSIT by the plaintiff, as drawer, against the defendant, as the acceptor, of a bill of exchange. Plea—that the bill was accepted without consideration. There was no replication.

If in an action on a bill of exchange, where there is a plea that there was no consideration, it appear at the trial that the plaintiff has not put any replication on the record, the Judge will not allow a replication to be added at the assizes without the consent of the defendant, but will order the case to be struck out of the list.

ALDERSON, B.—I have no issue to try in this cause. The defendant has pleaded a plea to which the plaintiff has not replied any thing. If the plaintiff had replied, and concluded with—"And this he prays may be inquired of by the country, &c.," perhaps the "&c." might be supposed to imply a similitur; but here there is no replication at all.

F. V. Lee, for the plaintiff.—Will your Lordship allow us to add a replication now?

ALDERSON, B.—What do you mean to reply?

F. V. Lee.—That there was a consideration—of goods sold.

ALDERSON, B.—I cannot allow you to do that, because, if you reply in that way, the defendant may have to plead some matter by way of rejoinder, which may make it necessary to call witnesses who may not be here. For example, he may rejoin that those goods have been paid for. There is a case reported (*a*) where my brother, *James Parke*, had a cause set down for trial before him, in which there was no issue joined, and he struck it out of the paper. I think that is what I must do here, unless the defendant consents to your replying now.

(*a*) The case of *Bent v. Benyon*, ante, p. 217. See also the case of *Clark v. Nicholson*, post.

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R. V. Richards, for the defendant, would not consent.

ALDERSON, B.—Let the cause be struck out of the paper.

F. V. Lee, for the plaintiff.

R. V. Richards, for the defendant.

[Attornies—*Holland*, and *Lumley*.]

July 22d.

WALKER and Wife v. The Countess of BEAUCHAMP.

If the vicar of a parish be applied to for an extract of a parish register of a particular date, and he state that there is no register book of that year, this is not sufficient proof of loss of the book to let in secondary evidence of the contents of the register, without calling the vicar; but if the vicar had produced to the applicant a book as the original

register, the Judge at the trial would have held it to have been so, unless the contrary was shewn.

Seemle, that the returns made annually of transcripts of parish registers to the registry of the diocese, under the 70th canon, are not receivable in evidence instead of the original register, or an examined copy of it, without proof of the loss of the original register; but *seemle*, that if the original be proved to have been lost, examined copies of these returns would be admissible.

But if the returns were made under the statute 52 Geo. 3, c. 146, secs. 6 & 7, *seemle*, that examined copies of them would be evidence, without proof of the loss of the original register.

If an original parish register be produced on a trial, that certain entries in it should be read, the jury may look at the book to see whether the entries which have been read are in their proper places or not, but for no other purpose.

A., in the year 1798, died possessed of property, which, many years afterwards, B. commenced a suit to recover. In the year 1799, a relation of B. made a declaration, the effect of which was to shew that B. was the heir and next of kin of A.:—Held, that this declaration was not receivable in evidence, as the *lis mota*, or commencement of controversy, must be taken to be the arising of that state of facts on which the claim is founded, without any thing more.

remiah Smith and Elizabeth his wife, Mr. Wilkinson, who was an attorney in London, stated that he had applied for a sight of the parish register of baptisms of the parish of Edgbaston for the year 1770, and that the vicar had stated to him that there was no register there of the date inquired for.

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Sir *J. Scarlett*, for the defendant.—I must object to evidence of what the vicar said.

Wilde, Serjt., for the plaintiff.—It is the answer of the proper officer.

ALDERSON, B.—The fact of there being no register of that date in existence, in the proper custody, should be proved by the oath of the person in whose custody it ought to be. I think that proof of what he says is not evidence that there is, in fact, no such register.

Talfourd, Serjt., proposed to give in evidence an examined copy of the transcript of the register, returned to the bishop's registry at Litchfield under the 70th canon of the canons of 1603, by which, after ordaining that registers of every christening, wedding, and burial shall be kept in every parish church and chapel, proceeds to ordain, that "the churchwardens shall once in every year, within one month after the five and twentieth day of March, transmit unto the bishop of the diocese, or his chancellor, a true copy of the names of all persons christened, married, or buried in their parish in the year before (ended the said five and twentieth day of March), and the certain days and months in which every such christening, marriage, and burial was had, to be subscribed with the hands of the said minister and churchwardens, to the end the same may faithfully be preserved in the registry of the said bishop; which certificate shall be received without fee. And if the minister or churchwardens shall be negligent in perform-

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ance of any thing herein contained, it shall be lawful for the bishop or his chancellor to convent them, and proceed against every of them as contemnors of this our constitution."

Sir *J. Scarlett*.—I must object to that evidence.

ALDERSON, B.—I have known these transcripts given in evidence.

Sir *J. Scarlett*.—If the original register was proved to have been lost, this copy might be evidence; and so, perhaps, might a copy found in the parish, if it was of equal date with the original.

ALDERSON, B.—Is not the principle on which they are received in evidence, that, under a canon, they are to be sent annually to the bishop's registry, and that they are therefore public documents, the same as the registers themselves? It is, therefore, argued, that they are evidence, without proof of the loss of the original.

Maule.—Being but copies of the original registers, I should submit that they could be no more than secondary evidence of those originals.

ALDERSON, B.—If that were so, how could they ever be evidence to contradict the original register, as they were in the *Angel* case?

Maule.—These copies being made under a canon, they were in effect of the same authority as if a witness said, "I copied these entries at a certain date, and then the original was not in the same state in which it is now."

Wilde, Serjt.—It is offered in evidence as an authenticated copy of the original.

Maule.—Then you ought to prove the loss of the original.

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Wilde, Serjt.—It is an extract of a return made to the registry of the diocese under a canon. It is quite clear that an examined copy of a register is evidence; and I offer this as an examined and authenticated copy of that original register, first shewing that we have applied at the proper place to get a sight of the original book. It is proved that we could not see the original book; and we then go to the return made under the canon law, and get an extract from that; and, as the return may, like the original, be wanted at several places at the same time, I take it to be clear that an examined copy of the return is as much evidence as the return itself would be.

ALDERSON, B.—I take it that there is no definite proof of the loss of the original register. If you have that, I shall admit the examined copy of the return beyond all doubt. If you satisfy me that you have made sufficient search for the original, I shall receive the return the same as I should an examined copy. As it is an authenticated copy of the original, taken under the canon, and as that is a public document, you may put in an examined copy of what you found at the bishop's registry; but I think you should shew the loss of the original register. I shall hold that the return found at the bishop's registry is evidence that there was an original, and that that is an authentic copy of it.

Mr. Wilkinson, being recalled, said—I applied at the parish church at Edgbaston, and saw the vicar, who had several registers, which I examined. I asked for the original registers of the year 1770. A book was produced, which purported to be a copy of the original register, and was so headed. I inquired for the original register of that time, and none was produced.

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Wilde, Serjt.—Were you informed whether there was any?

Sir J. Scarlett.—You have it, that this book purported to be but a copy.

ALDERSON, B.—If the book had been produced to the witness by the proper officer as the original, I should have held it to be so.

Sir J. Scarlett.—Mr. Wilkinson asks for the original, and receives an answer from the vicar, which is not upon oath, that there is no original.

Wilde, Serjt.—The witness applies for the original, and he may certainly give evidence of what answer he got.

ALDERSON, B.—But that will not be proof of the loss of the original.

Wilde, Serjt.—I apprehend that it certainly cannot be necessary to call the clergyman. All that is required is, that we should go to the proper officer for the book, and if he says he has it not, his answer is accredited.

Talfourd, Serjt.—It is said that we should call the vicar. Now, as he is a public officer, the same inconvenience would arise in taking him to different places to prove the loss of the book, as would be occasioned by not allowing examined copies to be used in other cases. If the judgment roll for certain years was lost or destroyed, would it be necessary to take the clerk of the judgments to every assize town where there was a judgment of any of those years to be proved?

ALDERSON, B.—I am sorry to be obliged to decide so important a point at *Nisi Prius*, but I certainly think that this evidence is not receivable; because, prior to receiving

secondary evidence, you must shew that the original document cannot be produced. I think that the vicar should be called, and that what he says is no proof of the loss. If you had the vicar's testimony that he could not find any original, I should receive your evidence. As secondary evidence you are certainly not entitled to use it; but there is still another very important question, whether this return may not of itself be evidence.

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Wilde, Serjt.—The original parish register need not in any case be produced; and I apprehend, that, if it be the duty of a certain public officer to make a certain annual return of a copy of a register to another public officer, that such returns, so made and filed, are of themselves evidence that there was an original, and that they are authenticated copies of such original; and, assuming these returns to be an accredited copy of the original, it would not be necessary to produce the original. I should maintain, that this return, being authenticated as the law requires, is receivable in evidence even if the original existed.

ALDERSON, B.—If I were to reject the evidence, and the case were to go off upon this point, it would be sent down here again for another trial.

Sir J. Scarlett.—The vicar is in Court.

ALDERSON, B.—I was not aware of that. That being so, I do not know that the Lord Chancellor would direct the case to come here again.

Sir J. Scarlett.—This return is made under a canon, and I do not know that these canons are binding on any but the clergy. I am aware that the statute 52 Geo. 3, c. 146, ss. 6 & 7, directs similar returns to be made, and the returns made since that statute would fall within the rule my friend lays down. These copies were no doubt intended as a check upon the original, and to prevent interpola-

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tion, and not to supersede the original itself. It was never meant, that, if the original existed, these copies should be used instead of it; and I certainly never knew one of these returns given in evidence instead of the original when the original could be produced.

ALDERSON, B.—In the *Angel* cause, there was an entry of Harriet Angel in the original register, which was alleged to be forged, as the name of Mary Anne Angel was in the copy at the bishop's registry.

Sir *J. Scarlett*.—This return was never intended to be used as an original document. If a party were to have to prove a record of the Court of Exchequer, would it be sufficient for him to say, "I went to the office, and the clerk said he had no such record; and I found a copy in my office which purports to have been made twenty years ago?"

ALDERSON, B.—You say that if the original is fair, and can be produced, this return is not receivable.

Sir *J. Scarlett*.—I say, that, without proof of the loss of the original, this return is not evidence.

ALDERSON, B.—Do you make any distinction between a copy of that which is found in the bishop's registry and the return itself, which is deposited there?

Sir *J. Scarlett*.—The former would be but a copy of a copy. If the original were lost, the bishop's copy might be produced, but not a copy of that copy. I supposed that the returns from the bishop's registry were here. An examined copy of the original may be evidence, but certainly not a copy of a copy.

ALDERSON, B.—I entertain considerable doubts in this case. The best way will be to receive the evidence. A

copy of a public document is evidence, because it is convenient that it should remain in the place in which it is deposited; and a copy of a parish registry is therefore evidence. This copy in the bishop's registry was made by the vicar under the canon; that, therefore, is a copy made by public authority, and deposited in a public place. I take that, therefore, to be evidence that there was an original, and that that is a true copy of such original. I think, further, that that return, being a copy of the register made by public authority, is evidence, and that it being itself a public document, the same rule applies as to the inconvenience of its removal; and that, therefore, an examined copy of that return is receivable. I entertain great doubts; but I will receive the evidence.

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The copies were not put in; and *Wilde*, Serjt., called the Rev. Charles Powell, the vicar of Edgbaston, who stated that there were no original registers earlier than 1771; and that, from 1635 to that time, there were copies in a book authenticated by a certificate of Mr. Stephens, a former curate of the parish.

The entries in the copy of the register authenticated by Mr. Stephens's certificate were read.

Mr. Powell produced the original register of baptisms of the year 1658, from the parish of St. Martin's, in Birmingham, containing the registry of the baptism of Anne, the daughter of Humphrey Jennings.

Sir *J. Scarlett* proposed that the jury should look at the other entries in this book.

ALDERSON, B.—The jury may look at the book to see whether the entries which have been read are in the right places. So far they may look at it, but for no other purpose.

It was admitted that Mr. Thomas Jennings, the person

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whose property was the subject of the present suit, died in the year 1798, but that the present suit was not commenced till many years after.

To prove a declaration made by Mrs. Mary Smith, a daughter of Jeremiah Smith and Elizabeth Jennings, Mrs. Cooper was called. She said, "I am now forty-nine or fifty. Mrs. Mary Smith died when I was fifteen (which would be about 1799 or 1800). I do not know how long before her death it was that I had the conversation with her which I am going to relate."

ALDERSON, B.—This might be a declaration made after Mr. Jennings's death. Might not these parties have been making a claim?

Wilde, Serjt.—I know that where a controversy has existed, it is not necessary, in order to exclude the evidence, to shew that each person making the declaration knew of it.

ALDERSON, B.—That was expressly decided in the *Berkeley Peerage* case (a).

Wilde, Serjt.—But, to exclude the evidence, there must be proof that there was, in fact, some controversy. If it cannot be shewn that any dispute existed, there is no motive to make declarations; and the mere fact of Thomas Jennings's death having taken place is no reason for excluding the evidence.

Sir *J. Scarlett*.—The admission of such evidence would be full of danger.

ALDERSON, B.—Lord Chief Justice *Mansfield* says, that the declarations are to be excluded if made after the con-

(a) 4 Campb. 401.

troversy, although the fact of the controversy was not known to the party making them. I cannot help thinking that the controversy must be considered to have begun the moment that Mr. Jennings died.

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Sir J. Scarlett.—This is a species of case in which evidence of declarations is received as an exception to the general rules; such evidence, therefore, ought to be received with due caution. If the existence of a controversy were essential to the exclusion of it, a party might lie by and make no controversy till he got a sufficient body of this kind of evidence; and in every case where a man died intestate with a large property, persons could lie by and get evidence of this sort in abundance.

ALDERSON, B.—I still think that the commencement of the controversy must be taken to be the arising of that state of facts on which the claim is founded, without any thing more.

The evidence was rejected.

Verdict for the defendant.

Wilde and Talfourd, Serjts., and R. V. Richards, for the plaintiffs.

Sir J. Scarlett, Maule, Whateley, Follett, and Talbot, for the defence.

[Attornies—*Mayhew, and Walford.*]

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(Crown side.)

BEFORE MR. JUSTICE WILLIAMS.

July 25th.

REX v. MOSES MARTIN and AARON MARTIN.

On the trial of an indictment for a rape the prosecutrix may be asked, whether, previously to the commission of the alleged offence, the prisoner has not had intercourse with her by her own consent.

RAPE.—The indictment charged the prisoner, Aaron Martin, as the principal in the first degree, and the other prisoner as a principal in the second degree.

The prosecutrix stated the offence to have been committed on the 24th of June, 1834.

F. V. Lee, for the prisoners, proposed to ask the prosecutrix whether, on the Whitsunday before the alleged offence, the prisoner, Aaron Martin, had not had intercourse with her by her own consent.

Ferard, for the prosecution, objected to the question, and relied on the cases of *Rex v. Hodgson* (a), and *Rex v. Clarke* (b).

WILLIAMS, J.—I was one of the counsel in the case of *Rex v. Hodgson*. The question in the present case is as

(a) R. & R. C. C. R. 211. In that case it was held, that, on an indictment for a rape, the prosecutrix is not compellable to answer whether she has not had connexion with other men, or with a particular person named; nor is evidence of her having had such connexion admissible. But, in the case of *Rex v. Aspinall*, 2 Stark. Law of Ev. 700, *Hullock*, B., held that, on the trial of an indictment for a rape, the prisoner might shew that the prosecutrix had been

previously criminally connected with himself.

(b) This was a case of an assault, with intent to commit a rape; and there Mr. Justice *Holroyd* held that, on trials for this offence, and also for rape, the defendant may impeach the character of the prosecutrix for chastity by general evidence, but not by evidence of specific facts. See also the case of *Rex v. Barker*, ante, Vol. 3, p. 589.

to previous intercourse with the prisoner, and the question there was as to intercourse with other men. I shall certainly receive the evidence, and I must say that I never could understand the case of *Rex v. Hodgson*. The doctrine, that you may go into general evidence of bad character in the prosecutrix, and yet not cross-examine as to specific facts, I confess does appear to me to be not quite in strict accordance with the general rules of evidence.

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The question was put.

Verdict—Not guilty.

Ferard, for the prosecution.

F. V. Lee, for the prisoners.

REX v. BALL and Others.

July 28th.

INDICTMENT for administering an unlawful oath (a).
The *first* count charged, that the prisoner, on the 27th

Where an oath
was administered,
that the
party taking it

should not make buttons under certain stated prices, and should keep all the secrets of the lodge:—Held, to be an administering of an unlawful oath within the statutes.

The administering an oath or engagement to any person not to reveal the secrets of any association is an offence within those statutes.

(a) By 37 Geo. 3, c. 123, s. 1, it is enacted, "that any person or persons who shall, in any manner or form whatsoever, administer, or cause to be administered, or be aiding or assisting at, or present at and consenting to, the administering or taking of any oath or engagement, purporting or intended to bind the person taking the same to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be of any association, society, or confederacy, formed for any such

purpose, or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander, or other person, not having authority by law for that purpose, or not to inform or give evidence against any associate, confederate, or other person, or not to reveal or discover any unlawful combination or confederacy, or not to reveal or discover any illegal act done or to be done, or not to reveal or discover any illegal oath or engagement which

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day of February, 1834, at &c., "did feloniously administer to Eliza Beswick a certain oath not to inform or

may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years; and every person who shall take any such oath or engagement, not being compelled thereto, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years." See 39 Geo. 3, c. 79; 52 Geo. 3, c. 104; and 57 Geo. 3, c. 19. By sect. 25 of the latter stat. it is enacted, "that from and after the passing of this act, all and every the said societies or clubs, and also all and every other society or club now established, or hereafter to be established, the members whereof shall be required or admitted to take any oath or engagement, which shall be an unlawful engagement within the meaning of" the 37 Geo. 3, c. 123, "or within the meaning of" the 52 Geo. 3, c. 104, "or to take any oath not required or authorized by law; and every society or club, the members whereof, or any of them, shall take or in any manner bind themselves by any such oath or engagement, on becoming, or in order to become, or in consequence of being, a member or members of such society or club; and every society or club, the

members or any member whereof shall be required or admitted to take, subscribe, or assent to, or shall take, subscribe, or assent to any test or declaration not required or authorized by law, in whatever manner or form such taking or assenting shall be performed, whether by words, signs, or otherwise; either on becoming or in order to become, or in consequence of being a member or members of any such society or club; and every society or club that shall elect, appoint, nominate, or employ any committee, delegate, or delegates, representative, or representatives, missionary or missionaries, to meet, confer, or communicate with any other society or club, or with any committee, delegate or delegates, representative or representatives, missionary or missionaries, of such other society or club, or to induce or persuade any person or persons to become members thereof, shall be deemed and taken to be unlawful combinations and confederacies, within the meaning of" stat. 39 Geo. 3, c. 79, "and shall and may be prosecuted, proceeded against, and punished, according to the provisions of the said act; and every person who, from and after the passing of this act, shall become a member of any such society or club, or who, after the passing of this act, shall act as a member thereof, and every person who, from and after the passing of this act, shall directly or indirectly maintain correspondence or in-

give evidence against any associate, confederate, or other person belonging to a certain unlawful association or confederacy, which said oath was then and there taken by her the said Eliza Beswick." The *second* count stated the oath to be "not to reveal a certain unlawful combination and confederacy." The *third* count stated it to be "not to reveal any act done or to be done by certain per-

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tercourse with any such society or club, or with any committee or delegate, representative or missionary, or with any officer or member thereof, as such, or who shall, by contribution of money or otherwise, aid, abet, or support such society or club, or any members or officers thereof, as such, shall be deemed guilty of an unlawful combination and confederacy, within the intent and meaning of the said act (39 Geo. 3, c. 79), and shall and may be proceeded against, prosecuted, and punished, according to the provisions of the said act with regard to the prosecution and punishment of unlawful combinations and confederacies." And by the 26th sect. of the same stat. it is enacted, "That nothing in this act contained shall extend, or be construed to extend, to any society or societies holden under the denomination of lodges of freemasons, in conformity to the rules prevailing in such societies of freemasons, provided such lodges shall comply with the rules and regulations contained in the said act of" 39 Geo. 3, c. 79, "relating to such lodges of freemasons, nor to any declaration to be taken, subscribed, or assented to by the members of any society,

the form of which declaration shall have been first approved and subscribed by two or more justices of the peace, and confirmed by the major part of the justices present at a general session, or at a general quarter sessions of the peace, pursuant to the rules and regulations contained in the said act of" 39 Geo. 3, c. 79; "nor shall extend, or be construed to extend, to any meeting or society of the people commonly called Quakers, or to any meeting or society formed or assembled for purposes of a religious or charitable nature only, and in which no other matter or business whatsoever shall be treated of or discussed."

By the stat. 37 Geo. 3, c. 123, s. 2, it is enacted, that persons who are compelled to take unlawful oaths, &c., shall not be justified or excused, unless they disclose it in the manner there prescribed within four days. Sect. 3, of the same statute regulates the form of the indictment; and sect. 5 defines what shall be deemed an oath; and, by sect. 6, it is provided that these offences, if committed in England, abroad, or at sea, may be tried before "any court of oyer and terminer, or gaol delivery for any county" in England.

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sons belonging to a certain unlawful association." The *fourth* count stated the oath to be "not to reveal any illegal oath which may have been administered or tendered to or taken by certain persons belonging to a certain unlawful association, or the import of any such oath." The *fifth* count stated the oath to be "not to inform or give evidence against any associate or other person belonging to a certain association." The *sixth* count stated it to be "not to reveal a certain other unlawful combination." The *seventh* count charged that the prisoner did "cause to be administered" to the said Eliza Beswick an oath "not to reveal any act done or to be done by certain persons belonging to a certain other unlawful association." The *eighth* count was for causing to be administered an oath, the same as in the fourth count. The *ninth* count was for causing to be administered to E. B. an oath "to be of a certain association, society, or confederacy, formed for the purpose of disturbing the public peace." The *tenth* count was for causing to be administered to her an oath "to obey the orders of a certain committee or body of men not lawfully constituted, and of certain persons not having authority by law for that purpose."

The prisoners pleaded guilty, and were recommended to mercy by the committing magistrate, Dr. Greaves, and also by *F. V. Lee*, on the part of the prosecutors.

The following are copies of the depositions which were adverted to by the learned Judge in delivering his opinion.

"The Deposition of Eliza Beswick, the wife of Richard Beswick, of Flash, in the county of Stafford, traveller.

"I live in Flash, in the parish of Alstone-field, and am the wife of Richard Beswick, traveller. I make buttons, and am employed by different manufacturers. In the early part of February Mr. Isaac Brunt, of Leek, came to the Traveller's Rest, a public-house where a trade's union was

kept, and advised the button people to commence a union; and if we would convene a meeting they would attend, and put them in a way. Consequently, Joseph Coates, Thomas Malkin, William Ball, Joseph Haywood, and Henry Booth came to the Traveller's Rest on the 27th of February. I was there. They all said it would be for our good to enter the union, and that we should never have cause to repent it. There were a great number of women there. We, of our own free will, declared that we would not make any buttons under 6*d.* and 10*d.* They sang and prayed, and then we took the oath, and in what they called the club-room. Previously to going into the room, a woman, whom I do not know, bound my eyes with a handkerchief, and led me to a large dining-table in the club-room. We all knelt down, and had our right hands on the left breast, and the left hands on the Bible. We solemnly declared we would not make any buttons under 6*d.* or 10*d.*; that we would keep all the secrets of the lodge, and never give our consent that any of the money should be divided or appropriated to any other purpose than the use of the union: if we did, might our souls drop into the bottomless pit. One of the prisoners then said, 'Now, sisters, you are members of our honourable society, and may you ever prove worthy of the honour conferred upon you.' Joseph Haywood gave me the words, and I repeated them after him. We kissed the Bible previous to using the words above stated. Sarah Beswick was sworn at the same time. I had hold of her hand. We were to subscribe 2*d.* weekly; and, at the expiration of a quarter of a year, we were to turn out for wages; and, while the turn out was, they would allow 6*s.* per week. All the prisoners and William Heath were present while I was initiated. Mr. Haywood gave me my oath; and William Ball, I was informed, had the whole management of the union. I paid 2*d.* for entrance money, and they came again in about three weeks, and received 6*d.* from me. I paid the 6*d.* to John Johnson. I collected

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two different sums, one was 3*l.* 5*s.* 8*d.*, and the other I do not recollect. I collected it at the request of John Johnson and Paley. Bocock Paley and John Johnson came to the Flash some time after we had been initiated, and told us the Dorchester men had been transported for giving the oath, and begged of us to be initiated afresh. We readily consented to it, and we were initiated afresh, and John Johnson delivered me the book now produced. When we were sworn the handkerchief hurt my eyes, and I put it up, so that I could see what was going on. I saw the prisoners and William Heath present. Heath and Haywood had white dresses on, like surplices. I cannot take upon me to swear that Heath administered an oath, but he was taking an active part in other measures that went on. Haywood administered the oath to me. Two persons held a hatchet and a sword over the table during the ceremony. They then took the handkerchief off my eyes, and I left the room. It was crowded to excess. The book now produced contains an account of the different sums received by me on account of the union.

“Cross-examined by Henry Booth.—I will swear that William Ball, Thomas Malkin, Joseph Coates, Joseph Haywood, and Henry Booth were present when Haywood gave me the oath. Some of them presented the books to the persons present, and some were seeing that they repeated the words after they presented the oath. When the quarter was up we met at the Royal Cottage, at Middle Hills, and struck in form, and refused to make buttons at the old prices. I had some conversation at the Globe Inn, in Leek, in an upstairs room, with Mr. Haywood, about relieving us. Mr. Ball and, I think, George Plant were present. Betty Beswick went with me. They told me the funds were so low that they could not relieve us. Some time since, and after I had been to the magistrates at Mayfield, my husband wrote an anonymous letter addressed to Mr. William Ball, requesting the unionists to come to some agreement with the people at Flash, who

had been initiated into the union. I have never received any answer back from them. I put the letter into the Leek post-office myself.

(Signed) Eliza Beswick.

“ Taken and sworn before me,
W. Greaves.”

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The deposition of Sarah Beswick was as follows:—

“ I am a button-maker, and a member of the union. Some time ago I heard there was to be a meeting at the Traveller’s Rest, in Flash, to uphold the prices of the button trade. In consequence of which I went there, and saw Henry Booth and Joseph Haywood. I paid 2*d.* entrance to Booth. I was then blindfolded, just as I entered by the door, by some man; a woman then led me—she came from Leek, and told me to kneel down, and lay my right hand upon my left breast, and my left upon the Bible. I did so. Some man told me if I ever consented to make any buttons for less than the lodge price, 6*d.* and 10*d.*, and if ever I divulged any thing of the secrets, my soul might drop into the bottomless pit; and I repeated the words after him. After that I kissed the book. I considered I had taken an oath. Then the bandage was taken off my eyes, and I saw Henry Booth and Joseph Haywood. Haywood was the person who swore me. He had a white surplice on. There was two with surplices; one man had a sword and another an axe. They put it down to the bottom of the table, and said something; but I do not know what, I was frightened. We were to pay 2*d.* a week for three months to the union, and then to turn out, and receive 6*s.* a week from the union. At the expiration of three months we turned out, and I believe Mr. Beswick applied for some relief for us, but we got none. John Johnson and Mr. Beswick received money from me several times. The persons who had the surplices on, one had the blue and the other a red scarf over the shoulder. Eliza Beswick was in the room when I

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was initiated, and I had hold of her by the hand, I was so frightened. There has not been any person to me to make this business up; but we were detained this morning by three or four persons, who came to stop us from coming before the magistrate.

“ The mark ✕ of
Sarah Beswick.

“ Taken and sworn before me,
William Greaves.”

There were two other depositions to the same effect.

WILLIAMS, J.—I am bound to say that, having read the depositions, I do not entertain a particle of doubt that, provided the facts there disclosed had been proved against you, it was an offence within the statutes; and I believe that no man, who has the fairness or industry to peruse those acts of Parliament, and to understand them, can entertain a doubt that, to administer an oath or engagement not to reveal the secrets of any association, is within the stat. 37 Geo. 3, c. 137, as explained and modified by subsequent statutes—I say that it is within the meaning of those statutes, not as has been ignorantly supposed or represented, because it had reference to any matter respecting wages; but on the ground that every association of that kind, bound together by an oath not to disclose the proceedings of that society, is for that reason, and not for the other, an unlawful combination within the meaning of the statutes of the realm.

The prisoners were discharged on their own recognizances, to appear to receive judgment when called upon.

F. V. Lee, for the prosecution.

Ludlow, Serjt., and *Godson*, for the prisoners.

[Attornies—*Cruso*, and *Jones*.]

THE following case, being on the same subject, we have subjoined it:—

1816.

GLOUCESTER SPRING ASSIZES, 1816.—BEFORE MR. JUSTICE
HOLROYD.

REX v. BRODRIBB.

April 11th.

INDICTMENT for administering an unlawful oath, which was administered to sixteen persons before they went out for the purpose of night poaching (*a*). The *first* count stated that the prisoner, on the 18th Jan. 56 Geo. 3, at &c., “feloniously did administer, and cause to be administered, to one John Penny, one William Penny, one Thomas Collins, one John Allen, one Daniel Long, one John Reeves, one John Hayward, one James Jenkins, one Thomas Morgan, one James Roach, one Robert Groves, one Thomas Hayward, one Anthony Barton, one William Collins, one William Greenaway, and one John Burley, a certain oath, then and there accordingly taken by the said John Penny, &c.; and which said oath then and there purported and was then and there intended to bind the said John Penny, &c., then and there taking the same, not to inform or give evidence against any associate, confederate, or other person, of or belonging to a certain association and confederacy of persons then and there associated and confederated together to do a certain illegal act,” against the statute, &c.

The provisions of the stat. 37 Geo. 3, c. 123, which make it a felony to administer an unlawful oath, are not confined to oaths administered with either a mutinous or a seditious object.

A party of sixteen persons were going out armed for the purpose of night poaching; before they went out the prisoner swore them all to secrecy:—Held a felony within that statute.

Where sixteen persons took the same unlawful oath, two or three at a time, all being present:—Held, that the person who administered it might be

Second count.—“That the said William Adams Brodribb, on the said 18th. Jan., in the fifty-sixth year aforesaid, with force and arms, at Moreton aforesaid, feloniously did administer and cause to be administered to the said John Penny, &c. a certain oath, then and there accordingly taken by the said John Penny, &c.; which last-mentioned oath then and there purported, and was then and there intended, to bind the said John Penny, &c., so then and there taking the same, not to reveal or

convicted on an indictment for administering “a certain oath to A., B., C., D., &c. (naming the whole sixteen persons).

If the indictment state the oath to have been not to inform or give evidence against any person belonging to a confederacy of persons associated together “to do a certain illegal act,” this is sufficient without its being stated what the illegal act was.

If the oath administered was intended to make the parties to whom it was administered believe themselves under an engagement, it is equally within the statute whether the book on which they were sworn was a Testament or not.

(*a*) Eleven of these persons were tried at these assizes for the murder of William Ingram, an assistant game-keeper, on the night of the 18th of

January, 1816, and convicted:—two of them were afterwards executed, and the remaining nine were transported for life.

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discover a certain illegal act thereafter to be done by them the said John Penny, &c., then and there associated and confederated for that purpose, against the form of the statute," &c.

Third Count.—"That the said William Adams Brodribb, on the 18th January, at Moreton aforesaid, feloniously did administer and cause to be administered to the said John Penny, &c. a certain other oath, then and there accordingly taken by the said John Penny, &c., and which said last-mentioned oath then and there purported, and was then and there intended, to bind the said John Penny, &c. to disturb the public peace, against the form of the statute," &c.

The *fourth*, *fifth*, and *sixth* counts were, for being present, aiding and consenting at the administration of the oath. The *seventh*, *eighth*, and *ninth* counts were the same as the first, second, and third, only laying it as an engagement instead of an oath; and the *tenth*, *eleventh*, and *twelfth* corresponded to the fourth, fifth, and sixth, for being present, aiding, and consenting at the administration of the engagement.

A witness named Greenaway said, "I was at Allen's house on the 18th January last, at Lower Moreton; he lives about two hundred yards from me. Allen is a farmer, a young man: I know the prisoner Brodribb, who also lives rather better than half a mile from John Allen's. Brodribb is an attorney. Allen and Brodribb were intimate: I have often seen them together at Allen's house. I saw, on the night of the 18th, Brodribb, Kean, and Hasell, at Allen's. They came about a quarter before ten. Allen was not at home. Beside me, there were at that time two Pennys, two Collins's, Daniel Long, and the three gentlemen. A little after ten, Allen himself came home. We were all in the kitchen. When Allen came in, he brought with him some powder and shot; he put it down on the table in the kitchen before the party. The poachers who went out that night were not all present then: only those I have just mentioned. Long and I were in discourse about keepers, or something; Brodribb said, one poacher will beat two or three keepers. The two Pennys, and the two Collins's, brought in a gun a-piece. Allen said, 'there's some ammunition for you, gentlemen; it amounts to sixty charges.' One of the company asked, 'have you brought any flints?' and Allen said, 'yes, gentlemen, I can accommodate you with that.' He then put his hand in his pocket, produced some flints, and put them on the table. I went out into the orchard, and came in again. As I went out, Barton and Reeves were coming up. Barton went in, after speaking to me. There were some streaks of black on his face in three or four places. Reeves also went in. Before I returned, the two Haywards, Groves, Roach, and Morgan had come in. There were nine guns; I don't know who brought them: one was

double-barrelled. In a few minutes afterwards, I returned into the kitchen. Some went into the parlour, and came back with their faces blacked: and as some came out, others went in. I don't recollect whether Brodribb was in the kitchen or not when I returned from the orchard. We all had our faces blacked, except Brodribb, Hasell, and Kean: that is, all who were going out. Burley and Jenkins were not present at that time. While the faces were being blacked, Kean chalked the hats. The hats of all who were going out were chalked. Some one of the party, I don't know who, said, 'we should be sworn; Mr. Brodribb, you shall swear them.' This was said in the parlour. Mr. Brodribb then went out of the parlour into the kitchen, and fetched a book, and returned into the parlour to the party. He swore the men with that book, two or three at a time. When I was sworn, two were sworn with me: Mr. Brodribb had hold of one corner of the book, and we three of the other three corners. He said, 'you shall not *peach* upon each other of the party, so help you God; and kiss the book.' He gave us the book as he said this; and we kissed the book, every man round, as he gave the oath. Burley and Jenkins came in directly after this: they were not admitted further than the bottom of the stairs: they were sworn there the same as the rest of us had been by Mr. Brodribb. Altogether we who went out that night were sixteen. Before we went out of Allen's house, we were all sworn as I have stated. Mr. Brodribb was the person who swore us all. We sixteen were going out that night to poach. Our design was no secret to those who were present in the house. The hats of all the party were chalked. Allen's had a King's crown; the rest had letters, and a white spot. Kean chalked Allen's hat."

The examination of the prisoner, taken by the Rev. J. B. Cheston, the committing magistrate, before whom the prisoner was examined, was read, it was as follows: "I had no knowledge whatever of the party meeting at Allen's house till I saw them there. I saw a number of people there assembled, which rather astonished me. Amongst the rest I saw Greenaway and others, about sixteen, besides myself and two friends. I did not know where they were going. It had been reported several days that a party were going out by night to kill game. Many whom I saw there were notorious poachers, and therefore I thought they were going out that evening. The party were armed: some had sticks, some had guns. Greenaway had a gun: one, if not both of the Pennys, had guns, I believe; I should rather think that one of the Collins's had also a gun. I am positive Allen had no gun. I suppose there were five, six, or seven guns. Before they went away from Allen's house, some one, but who I do not know, proposed that they should be sworn. Some one said, 'Mr. Brodribb, will you swear us?' and asked for a Testament. I went into the next room, and saw a book, called

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'The Young Man's best Companion,' an account book. I returned with the book, and put it on the table; and some one took it up; and I then said, 'You shall not betray your companions.' I did not add, 'So help you God.' Many of them kissed the book. I was very careful that the book was not a Testament."

Taunton and *Ludlow*, for the prisoner, objected, first, that, as the preamble of the statute refers only to meetings for mutinous and seditious purposes, no oaths are within its prohibition, except those administered with some mutinous or seditious object, which was not the case here.

HOLROYD, J., without hearing the counsel for the prosecution, overruled the objection.

Taunton and *Ludlow* secondly objected, that the statute only prohibits those oaths of secrecy which relate to some illegal act, and that the word "illegal" imports a criminal and not a mere civil trespass; whereas it was a mere civil trespass that was contemplated at the time when the prisoner administered the oaths.

HOLROYD, J., without hearing the counsel for the prosecution, overruled this objection.

Taunton and *Ludlow* thirdly objected, that the oath was laid in the indictment as "a certain oath" (in the singular number) to all the sixteen, whereas the evidence made it appear that the sixteen were sworn in succession by a series of oaths.

Dawncsey and *Puller*, for the prosecution.—The form of words being the same, and the occasion the same likewise, the oath was the same oath to all the sixteen, though it was taken by them successively.

Twiss, on the same side.—The word "oath," in the language of the law, is customarily used in the singular number, when the same form is administered, on the same occasion, to a number of persons, although they take the oath in succession. The grand jury are always sworn by three or four at a time; but the indictments invariably begin, "The jurors for our Lord the King upon their oath present." Besides, the indictment here would be sufficiently supported by proof of the administration of the oath to any one of the persons mentioned; just as an indictment for larceny, where the prisoner is charged with having stolen various articles, is supported by proof of his having stolen any one of those articles, whether the theft of the rest be proved or not.

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HOLROYD, J.—The evidence does not seem to me to vary from the charge as laid in the indictment. The prisoner did, at one meeting, administer the oath to these various persons. It was administered successively indeed to the several persons sworn; but it was the same act of administering. The case, too, of an indictment for larceny applies exactly; a man is indicted for stealing several articles, and convicted on proof of his having stolen any one. So this may be taken as a complete transaction with respect to each person sworn; and the charge is therefore substantiated by evidence of the prisoner having sworn any one of the party. When a man is indicted for an assault on two jointly, he may be convicted for one assault, though he struck the parties successively; or he may be convicted of the assault as to one, and acquitted of it as to the other; which shews that each offence is complete by itself: and I should think this indictment satisfied by the mere proof of the oath having been administered to Greenaway, or to any other individual. Enough being proved to draw down the judgment prescribed by the statute, consistently with the indictment, the conviction will be proper, although there may be also something further in the indictment to which the proof does not extend. I have had no difficulty in my own mind; but as the objection was a nice and critical one, I thought it right to hear all that could be urged before I decided against it.

The prisoner was called on for his defence.

HOLROYD, J., (in summing up).—If the oath administered by the prisoner to the poachers was intended to make the people believe themselves under an engagement, it is equally within the act whether the book made use of was a Testament or not. As to the assembly itself, and its object, it is impossible that a meeting to go out with faces thus disguised, at night, and under such circumstances, can be any other than an unlawful assembly: in which case, the oath to keep it secret is an oath prohibited by this statute. If to go out in such a manner be not indictable as a conspiracy, it is clearly an offence visitable by penalties; perhaps it may even be indictable as a riot. It is not, however, necessary to determine that question now; because it is beyond all doubt an assembly for the purpose of an illegal act.

Verdict—Guilty.

Taunton and *Ludlow* moved to arrest the judgment, on the ground that the indictment did not in any of its counts set forth the nature of the act which the party were sworn to do or to keep secret. The third, sixth, ninth, and twelfth counts, in which the oath is laid as binding the party "to disturb the public peace," may at once be put out of the ques-

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tion, there having been no evidence that the disturbance of the public peace was any part of the task imposed by the oath, the tenor of which was merely an obligation to secrecy. Then the other eight counts do indeed correctly state the oath, as binding the party to secrecy; but not one of those counts specifies the nature of the act intended to be so kept secret; each count using the same general words, "a certain illegal act." This is insufficient, for the illegality of the act is of the essence of the offence; and unless the act itself is described, there is nothing on the face of the indictment to shew that it is an illegal one, and consequently nothing upon which the prisoner can be convicted.

HOLBORN, J.—I think that the four counts respecting the disturbance of the public peace are unsupported by the evidence; but I also think that upon the other eight counts the prisoner has been properly convicted. If a person is indicted for *doing* an illegal act, the act itself must, it is true, be set forth in the indictment in order that the Court may see that what he has done is illegal; but here the offence is not the illegal act of the poachers, but the administration, by the prisoner, of the oath which preceded it. The offence for which the prisoner is indicted—that is, the oath itself—is sufficiently set out in this indictment; and that is all the rules of pleading require. That which the defendant's counsel wish to have had stated is no part of what the prisoner did—it is not the offence itself, but something collateral, or at least extrinsic. It is easy to suppose a case where the illegal object is not revealed even to the parties sworn, until they have taken the oath not to divulge it. If a person were overheard administering such an oath, can there be a doubt that he would be indictable? And yet it might be impossible to learn the object so precisely as to set it forth upon the indictment. I must therefore proceed to pass sentence upon the prisoner.

Sentence—Seven years' transportation.

Dauncey, Puller, and Twiss, for the prosecution.

Taunton, and Ludlow, for the prisoner.

[Attornies—*Bloxome & Wells*, and *Hasell*.]

See the cases of *Rex v. Lovelass*, post, p. 596; and *Rex v. Dixon*, post, p. 601.

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SHROPSHIRE ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE WILLIAMS.

WOODWARD *v.* BALL.

July 30th.

DEBT for work and labour as an apothecary, and for medicines supplied, and for journies and attendance, and upon an account stated. Plea as to the work and labour, &c. as an apothecary, that the plaintiff was not in practice prior to or on the 1st of August, 1815, and that he had not since obtained a certificate from the Apothecaries' Company; and, as to the account stated, *nil debet*. Replication, that the plaintiff was in practice on and before the 1st of August, 1815 (following the words of the plea) (a).

Practising as an apothecary is the mixing up and preparing medicines, prescribed either by a physician or by any other person, or by the apothecary himself.

The acting as a surgeon or accoucheur is not practising as an apothecary; nor would the party supplying medicine

to a friend be so. But if the party *sought his living* by practising as an apothecary, that is sufficient, as it is not essential that he should have gained his whole livelihood by his practice.

(a) As the form of this plea is not in any of the printed collections we have subjoined it:—

Plea—And the said defendant, by James Hore, his attorney, as to the several sums of money and causes of action in the said declaration mentioned, so far as the same relate to the work and labour, care, diligence, and attendance on the said plaintiff, therein alleged to have been done, performed and bestowed, and the medicines and other necessary things therein alleged to have been found and provided, administered, delivered, and applied, and the journies and attendance therein alleged to have

been made, performed, and given by the said plaintiff as an apothecary therein mentioned, saith that the said plaintiff was not in practice as an apothecary prior to or on the 1st day of August, in the year of our Lord, 1815, neither hath he the said plaintiff at any time, either before or since, obtained a certificate to practise as an apothecary from the master, warden, and society of the art and mystery of apothecaries of the city of London, and this he the said defendant is ready to verify, &c.; and as to the said sum of 10*l.*, in the said declaration alleged to be due from the said defendant to

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To prove the plaintiff in practice as an apothecary, the indenture under which he was apprenticed to and served Mr. Curtis, who was proved to be a surgeon and apothecary in large practice, was put in; and it was proved, that, after the expiration of his apprenticeship, which was in the month of June, 1814, the plaintiff fitted up a room in his mother's house in Queen Square, as an apothecary's shop, and had supplied medicines to friends of his mother while he so kept a shop there. It was further proved, that, in the month of December, 1814, the plaintiff removed to Gloucester Street, Queen Square, where he remained two years, and that he then had a regularly fitted up apothecary's shop with a counter in it, show bottles in the window, and a plate on the door, with the words, "Woodward, Surgeon and Accoucheur," engraved on it.

WILLIAMS, J.—Practising as a surgeon or as an accoucheur would not of itself be sufficient to entitle the plaintiff to recover in this action.

Ludlow, Serjt., for the defendant, submitted, that opening a shop was not a sufficient practising to entitle the plaintiff to a verdict; and that the jury must be satisfied that the plaintiff was *bond fide* practising as an apothecary, and not merely attempting to do so.

WILLIAMS, J., (in summing up).—The practising as an apothecary is the mixing up and preparing of medicines prescribed by a physician or other medical practitioner, who prescribes; or the mixing up and preparing of medicines prescribed by the party himself; and the cure of a wound

the said plaintiff, upon an account stated between them, the said defendant saith that he never was indebted in manner and form as in the said declaration is alleged, and of this he puts himself upon the country.

Replication.—A similiter as to the plea of *nil debet*, and to the residue an allegation that the plaintiff was in practice on and before August 1st, 1815, (exactly following the terms as the plea), and concluding to the country.

or the treatment of any case which is purely a surgical case would not be a practising as an apothecary; nor do I think that the mere application of a friend for medicine, to give a young man the aspect of business, would be a sufficient practising within this act. Still, it is not essential that he should have attended any particular number of patients; and the question I shall therefore leave to you is, whether the plaintiff, on and before the 1st of August, 1815, was *bonâ fide* in practice and seeking his living by practising as an apothecary. If you think that he was, I think that he is entitled to a verdict.

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The foreman of the jury.—We find a verdict for the plaintiff, and that he was in practice endeavouring to gain a livelihood.

WILLIAMS, J.—Are you of opinion that he was in practice?

The foreman of the jury.—We find that he was in practice; but we do not know that he got his whole livelihood by his practice.

WILLIAMS, J.—It is not essential that he should have gained his whole livelihood by his practice. The verdict must be entered for the plaintiff.

Verdict for the plaintiff—Damages, 8*l.* 4*s.*

Talfourd, Serjt., and *Whateley*, for the plaintiff.

Ludlow, Serjt., and *Godson*, for the defendant.

[Attornies—*Harper*, and *Hore*.]

IN the ensuing term, *Ludlow*, Serjt., applied to the Court of Exchequer for a rule to shew cause why there should not be a new trial; but the Court refused a rule.

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HEREFORD ASSIZES.

(Civil Side.)

BEFORE MR. BARON ALDERSON.

Aug. 4th.

HEMMING v. PARRY.

In general, the Judge at Nisi Prius will amend any variance which does not go at all to affect the matter really in dispute between the parties, and which was not likely to mislead the opposite party. Therefore, where a general warranty of the soundness of a horse was declared on, and a warranty "except in one foot" was proved, the Judge allowed the declaration to be amended, the real dispute between the parties being whether the horse was a roarer.

ASSUMPSIT on the warranty of a horse.—The declaration stated that the defendant sold the plaintiff a horse, and warranted it sound. Breach, that it was unsound. Pleas—*first, non assumpit*; and, *second*, a special plea, denying the unsoundness.

As soon as the case was called on, *Talfourd*, Serjt., applied for leave to amend the declaration, as in fact the warranty had not been a general warranty, as stated in the declaration, but a warranty with a qualification.

ALDERSON, B.—If the warranty contained a qualification which does not involve any question on the breach, I shall amend it. For example: if the warranty was a warranty of soundness all but one leg, and the unsoundness you go upon is a defect of the lungs, I shall allow the amendment; but I should like to hear the evidence before I make any order.

Mr. Hemming, the son of the plaintiff, stated, that, when he bought the horse, the defendant, Mrs. Parry, said the horse was sound everywhere except in one foot.

Evidence was given that besides having a sand crack in one of the hoofs, the horse was a roarer.

ALDERSON, B.—This is like the case of *Jones v. Cow-*

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ley (a), which was a great disgrace to the English law. I shall order the amendment. If the defence had depended in any way upon the qualification, I would not have allowed the amendment, as that would have gone to the merits. The report of the law commissioners is the rule I mean to go upon (b); and if the variance does not go at all to affect the matter really in dispute between the parties, and is not likely to mislead the opposite party, I shall allow it to be amended. The question, therefore, is, whether the exception in the warranty forms any part of the real dispute between the parties. If it does not, the amendment ought to be made; but the costs of the issue upon the warranty must be paid to the defendant at all events, and the main costs of the cause will abide the verdict as to the soundness.

Ludlow, Serjt.—I do not admit the amended warranty.

ALDERSON, B.—Then I say nothing about costs.

The declaration was amended, and there was a—

Verdict for the plaintiff.

Talfourd, Serjt., and *R. V. Richards*, for the plaintiff.

Ludlow, Serjt.; and *M' Mahon*, for the defendant.

[Attornies—*Milne*, and *J. Woodhouse*.]

(a) 6 D. & R. 533. That was an action of assumpsit on a warranty of a horse. The declaration stated a general warranty of soundness. The evidence was, that the defendant warranted the horse sound everywhere except a kick on the leg. This was held a fatal

variance, although the real question in dispute between the parties was, whether the horse was unsound by having a dropsy.

(b) The Second Report of the Common Law Commissioners, p. 86.

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*Aug. 5th.***REX v. The Inhabitants of St. WEONARD'S.**

If a parish be indicted for the non-repair of a pack and prime way, and it be proved that the way is a carriage way, this is a misdescription of the way, and the defendants are entitled to be acquitted.

In an indictment for non-repair of a highway, it is not necessary to state the *term*; but, if they are stated, they must be proved.

INDICTMENT for the non-repair of a pack and prime way. The indictment stated that there was and yet is a certain common and ancient pack and prime way leading from the town of Ross, in the county of H., towards and unto a certain other common and ancient pack and prime way leading from Garway to Orcop, and other places in the same county, for all the liege subjects of our said lord the King and his ancestors, on horseback and on foot, to go, return, pass, re-pass, ride, labour, and drive their cattle, at their free will and pleasure; and that a certain part of the said common pack and prime way, situate, lying, and being in the parish of St. Weonard's, in the same county, and commencing at the lower gate of a parcel of woodland, called Prior's Wood, part of the Colebrook estate, and passing through Prior's Wood, and part of Newton's Farm, and ending near a cottage in the occupation of John Andrews, and there communicating with the common and ancient pack and prime way leading from Garway aforesaid to Orcop aforesaid, and containing 188½ yards in length, and in breadth 15 feet, on &c., was out of repair. Plea—Not guilty.

It was stated by Mr. Flowers, who was a witness for the prosecution, that, in going along the way from Ross to Prior's Wood Gate, a person would pass 236 yards along a turnpike road, and then enter upon and go along a parish road, and then along another turnpike road, before he came to any road that was merely a pack and prime way. It also appeared that the way from Garway to Orcop was a carriage way.

ALDERSON, B.—You have described the road throughout the whole as a pack and prime way, and part of it is a turnpike road.

Ludlow, Serjt., for the prosecution.—I submit that a way does not cease to be a pack and prime way, because it is also a carriage way.

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ALDERSON, B.—The question is, whether this is misdescription. My brother *Parke*, on the former trial, directed an acquittal when the whole was charged to be a carriage way (*a*).

Ludlow, Serjt.—We there charged more than we could prove.

ALDERSON, B.—If this was not matter of description, the defendants on that occasion might have been found guilty of part, namely, of not repairing a pack and prime way, as every carriage way includes a pack and prime way. But, if it was matter of description, they could not.

Ludlow, Serjt.—Our allegation was then too large.

ALDERSON, B.—But I find, by the report, that you asked to have the case go on as to the pack and prime way only, and my brother *Parke* would not allow it. His decision must, therefore, have gone on the ground that it was matter of description. You describe the road as an ancient pack and prime way from Ross to another place, and you prove that the way from Ross is along a turnpike road, then along another road, and then on a second turnpike road, and then on the pack and prime way in question. Now, if my brother *Parke* ruled that the defendants could not be convicted of non-repair of a pack and prime way, under an indictment describing the road as a carriage way, how can I hold that the description of a pack and prime way is proved by evidence of a carriage way?

Ludlow, Serjt.—*Omne majus in se continet minus*. This

(*a*) Reported ante, Vol. 5, p. 579.

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is like the case of a prescription. If I prescribe for all sorts of commonable cattle, and prove a common for sheep, it is not enough; but, if I prescribe for sheep only, and prove a right for all cattle, I make out my case.

ALDERSON, B.—In cases of burglary, it is very common for the jury to acquit of the burglary and convict for the larceny. The difficulty here is, whether it is not matter of description.

Ludlow, Serjt.—The offence of burglary consists of many parts, and the offence of stealing is in itself separate. There are three species of ways, a footway, a pack and prime way, and a carriage way.

ALDERSON, B.—That is exactly my view of the case.

Ludlow, Serjt.—A carriage way includes a footway and a pack and prime way.

ALDERSON, B.—The question is not whether the one includes the other, but whether you have not described a different sort of way. If a person claims a right, he proves that right, if he proves that he has that right and something more; but if this is matter of description, it is no more correct if stated too large than it would be if stated too small.

Talfourd, Serjt., for the defendants.—If the prosecutors can describe this as a pack and prime way from Ross to Orcop, they might just as properly describe a pack and prime way from London to Orcop, and take the whole of the great road from London to Cheltenham as part of it. It may be that the *termini* are not necessary to be stated; but if they are stated, they must be stated correctly.

Godson, on the same side.—This is stated to be a pack

and prime way, extending throughout the whole distance to Ross.

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Justice.—In the case of *Allen v. Ormond* (a), it was held, that when a *terminus* was laid to be a certain public highway, that was proved by shewing it to be a public footway.

ALDERSON, B.—The case cited by Mr. *Justice* shews that it is necessary to describe the way correctly. The term “highway” applies to all the three sorts, and they proved a footway.

His Lordship, having conferred with Mr. *Justice Williams*, said—I have consulted with my brother *Williams*, and, as we both agree in opinion, I must act upon that opinion. It was unnecessary to have stated the *termini*; but as they are stated they must be proved. It is here stated that there is a pack and prime way from Garway to Orcop, the way from Garway to Orcop being in point of fact a carriage way. We both think that this is matter of description, and must be proved as laid. The defendants must be acquitted.

Verdict—Not Guilty.

ALDERSON, B.—I think that the stating of all these species of roads is matter of description; and the road from Garway to Orcop is stated to be one species of road instead of another.

Godson.—Does your Lordship hold that the road indicted is misdescribed.

ALDERSON, B.—Yes. It is the same point.

(a) 8 East, 4.

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Ludlow, Serjt., and *Justice*, for the prosecution.

Talfourd, Serjt., and *Godson*, for the defendants.

[Attornies—*Edwards*, and *Collins*.]

See the case of *Rex v. Upton on Severn*, ante, p. 133.

EVANS v. GETTING.

The manors of R. and of S., the parishes of C. and of Y., and the counties of Brecon and Glamorgan, were coterminous:—Held, that in an action for disturbance of common, in which the boundaries of the two manors came in question, a county history of the county of Brecon, which stated the boundaries of the counties at this spot, was not receivable in evidence.

THIS was an action for the disturbance of plaintiff's common, by cutting a trench across it. The question in the cause was, what was the boundary between the two parishes of Cadoxton and Ystradgunlais. It was admitted that these parishes, the manors of Neath and Brecon, and the counties of Brecon and Glamorgan, were coterminous.

On the part of the plaintiff, *Ludlow*, Serjt., proposed to read from Nicholls's *History of Brecknockshire* a statement of the boundary of that county at this spot.

Maule, for the defendants, objected that general history is not admissible in evidence; and insisted that the statements of text writers to the contrary rested upon cases which did not support the position advanced by them.

ALDERSON, B.—This is a history of Brecknockshire. The writer of that history probably had the same interest in enlarging the boundaries of the county as any other inhabitant of it. It is not like a general history of Wales. I shall not receive it.

The cause was ultimately referred.

Ludlow, Serjt., *Justice*, *E. V. Williams*, and *Talbot*, for plaintiffs.

Maule, *Talfourd*, Serjt., and *Richards*, for defendants.

[Attornies—*Vaughan & Bevan*, and *Macdonell & Mostyn*.]

Mr. Justice Buller says, B. N. P. 248, that a general history may be admitted to prove a matter relating to the kingdom at large, but cannot be received as proof of a private right or particular custom.

In the case of *St. Catherine's Hospital*, 1 Vent. 149, which was a trial at bar, the question was as to the right of a queen dowager to appoint a master of St. Catherine's Hospital; a record of 4 Edw. 3 was relied on to shew that a queen dowager had no such right, and the Court (Lord Hale being Chief Justice) allowed it to be "shewn out of Speed's Chronicles, produced in court, that Queen Isabel (the queen dowager) was under great calamity and oppression, and what was then determined against her was not so much from the right of the thing as the iniquity of the times." In the case of *Lord Brounker v. Sir R. Atkins*, Skin. 14, which was another case respecting the rights of a queen dowager, in relation to St. Catherine's Hospital, "Speed's Chronicle was given in evidence to prove the death of Isabel, queen dowager of Edw. 2; and though *Maynard* seemed to oppose it, and *Dolbin* said it was done by consent, yet the Chief Justice (*Pemberton*) said, he knew not what better proof they could have; and *Wallop* said, that, in the Lord's House, it was admitted by them for good evidence in the *Lord Bridgwater's* case."

In the case of *Stainer v. Burgeses of Droitwich*, 1 Salk 281, which was an issue out of Chan-

cery, wherein the question was "whether, by the custom of Droitwich, salt pits could be sunk in any part of the town or in a certain place only; and upon the trial at bar, Camden's Britannia was offered in evidence, and refused; for the Court held that a general history might be given in evidence to prove a matter relating to the kingdom in general, because the nature of the thing requires it, but not to prove a particular right or custom. So in the case of *St. Catherine's Hospital*, Hale, C. J., allowed a chronicle to be evidence of a particular point of history in Edw. 3rd's time. So a Year Book may be evidence to prove the course of the Court, yet, in this case, it was admitted that heralds' books are good evidence as to pedigrees, and parish registers as to births and marriages, upon the nature of the thing; and it was said, that, in the Exchequer, the question being whether the Abbey De Sentibus was an inferior abbey or not, Dugdale's Monasticon Anglicanum was refused for evidence, because the original records might be had in the Augmentation Office.

In *Piercy's case*, Sir Th. Jon. 164, which was an ejectment for the barony of Cockermouth, the lessor of the plaintiff derived his title from Sir Ingleram Percy, and offered in evidence Dugdale's Baronage of England, where it was stated that Sir I. P. died without issue; but it was not allowed to be given in evidence.

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GLOUCESTER ASSIZES.

BEFORE MR. BARON ALDERSON.

Aug. 11th.

BENNETT v. BENNETT.

If a defendant, in an action for verbal slander, at the time of speaking the slander gave up the name of the person from whom he heard it, this is no justification; but, if he did this, and at the trial prove that he did in fact hear the slander from that person, it will go in mitigation of damages.

SLANDER.—This was an action for words, imputing that the plaintiff had been many years ago guilty of embezzlement. Plea—general issue.

It appeared, that the plaintiff was the uncle of the defendant, and that the parties had been in partnership as corn dealers; but that, in consequence of disputes, they had dissolved their partnership. The words were proved; and it appeared, that, on some occasions, the defendant had stated that he had heard the slanderous matter from other persons whose names he mentioned at the time.

Ludlow, Serjt., for the defendant, observed, that, if the defendant had at all times named the person from whom he had heard the slander, it might have made a difference in his favour as regarded the verdict.

ALDERSON, B.—It would have made no difference. A man must not go about repeating slander, and saying of whom he heard it. It is no justification for him, that he at the time he repeats the slander gives up the name of the person from whom he heard it. If the defendant had said, at the time he spoke the words, that he heard the slanderous matter from another person, and named that person, and now at the trial had proved that he in fact did hear the slander from that person, it would be matter of mitigation.

Verdict for the plaintiff, with nominal damages.

Talfourd, Serjt., and *C. Phillips*, for the plaintiff.

Ludlow, Serjt., and *T. D. Whatley*, for the defendant.

[Attornies—*Matthews*, and *Whatley*.]

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In the case of *Davis v. Lewis*, 7 T. R. 17, Lord *Kenyon* says—“If a person say that such a particular man (naming him) told him certain slander, and that man in fact did tell him so, it is a good defence to an action to be brought by the person of whom the slander was spoken; but, if he assert the slander generally, without adding who told it to him, it is actionable; and the Court there held, that a defendant stating in his plea that he heard the slander from A. B. was no justification.” In the case of *De Crespigny v. Wellesley*, 2 M. & P. 695, it was held, that, in an action for publishing a libel, the defendant cannot justify the publication by pleading that the libellous publication was communicated to him by a third person, whose name he disclosed at the time of the publication; and, in giving judgment, *Best*, C. J., says—“We do not hesitate to say, that, even if we were to admit, (what we beg not to be considered

as admitting), that in oral slander, when a man at the time of his speaking the words names the person who told him what he relates, he may plead to an action brought against him, that the person whom he names did tell him what he related; at all events, such a justification cannot be pleaded to an action for a republication of a libel.” The authorities on this subject are collected and much discussed in the elaborate arguments of *Wilde*, Serjt., and *Spankie*, Serjt., in this case.

In the case of *Saunders v. Mills*, 3 M. & P. 520, the defendant, in an action for a libel in a newspaper, was permitted, under the general issue, to shew, in mitigation of damages, that he had copied the alleged libel from another newspaper, but was not allowed to shew that it had previously appeared in several other newspapers. See also the case of *Charlton v. Watton*, ante, p. 385.

JAMES v. BIDDINGTON.

CASE.—The *first* count was a count for criminal conversation with the plaintiff's wife, framed *in case*. See

In an action for crim. con., evidence on the part of the plaintiff to shew the

amount of the defendant's property is not admissible; but, in an action for a breach of promise of marriage, it is otherwise.

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cond count for *harbouring* her. *Third* count, trover (a) for wearing apparel and various articles of household furniture (b).

Evidence was given that the plaintiff's wife had cohabited with the defendant directly after she had left her husband's house; and a witness was called, who stated that the defendant was the owner of four freehold houses.

ALDERSON, B.—I do not think that that is evidence in this action.

Ludlow, Serjt.—I have often heard such evidence given.

ALDERSON, B.—Yes; but I think it is improper. In a case of this kind a plaintiff is entitled to so much damages as a jury think is a compensation for the injury he has sustained, and the amount of the defendant's property is not a question in the cause. In a case of breach of promise of marriage, the amount of the defendant's property is very material, as shewing what would have been the station of the plaintiff in society if the defendant had not broken his promise.

The evidence was rejected.

Verdict for the plaintiff—damages 20*l*.

Ludlow, Serjt., and *Phillpotts*, for the plaintiff.

C. Phillips, and *T. D. Whately*, for the defendant.

[Attornies—*Branscomb*, and *Whatley*.]

(a) A form of a count for criminal conversation drawn in case is given in 2 Ch. on Plead. 306; and counts for enticing away the plaintiff's wife, and for harbouring her, will be found in 8 Wentw. 418, and in the case of *Winsmore v. Greenbank*, Willes, 578; but a

count in trover joined with a count for adultery will probably not be found any where, except in the principal case.

(b) These articles the wife was stated to have taken with her when she left her husband's house.

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The Governor, Deputy Governor, Assistants, and Guardians of the Poor of the City of BRISTOL v. WAIT and Others.

REPLEVIN.—There were eight avowries. *First*, that the taking was under the provisions of the statute of Queen Elizabeth for the relief of the poor. *Second*, an avowry, stating that the plaintiffs occupied premises in the parish of St. Philip and Jacob, and that a poor rate was made on the 3rd of March, 1831, in which the plaintiffs were assessed at 35*l*. This avowry stated the summons, warrant of distress, and all the proceedings to enforce payment, and that the defendants were overseers of the poor of the parish of St. Philip and Jacob. *Third*, *fourth*, and *fifth*, the like avowries for three other rates. *Sixth*, an avowry in a similar form, stating the distress to have been for all the poor rates. *Seventh*, an avowry, reciting, that, by an act of Parliament, 1 Will. 4, the plaintiffs were empowered to buy property near the city of Bristol for the purposes of the poor, and that such property was to continue liable to rates; that the plaintiffs bought a building called the Armoury, and appropriated it to the use of the poor, and that the plaintiffs occupied the Armoury, and were liable to be rated for it. It then stated the rates and proceedings, as before. *Eighth*—This avowry was nearly similar to the seventh. Pleas to the first *six* avowries, *de injuriâ*; and, to the *seventh* and *eighth*, there were pleas admitting the act of Parliament mentioned in those pleas, with *de injuriâ* to the residue (a).

The private act of Parliament, 1 Will. 4, c. iv, which empowered the plaintiffs to buy lands and buildings for the use of the poor, recited, that, in the parish of St. Philip and Jacob, a certain building, called the Armoury, and certain messuages, buildings, and lands thereto belonging,

In replevin, the defendants avowed for a distress for poor's rate:—Held, that one of the defendants having acted as overseer of the poor was *prima facie* evidence that he was so:—Held, also, that to let in secondary evidence of his appointment, it was sufficient proof of loss that a witness stated that he, at the desire of the attorney, had applied to the defendant for his appointment, and that he said that he had lost it, without proving any search made.

If a private act of Parliament direct that overseers shall be appointed "for the term of three years then next ensuing," *semble*, that an appointment "for the space of three years next ensuing the date hereof, or until other overseers shall be appointed," is bad.

(a) There were other pleas, but they were demurred to.

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and a certain close of ground adjoining thereto, on the N. and N. W. sides, might be purchased at a moderate expense for purposes connected with the management of the poor, and empowered the plaintiffs to buy those premises; and, in sect. 13 of that statute, after reciting that 'when and so soon as the said lands, buildings, premises, yards, hereditaments, and premises, shall have been purchased by the said governor, deputy governor, assistants and guardians of the poor, and appropriated to the reception of paupers belonging to the city and county of the city of Bristol, under the provisions of this act, the same will not be subject and liable to such rates, taxes, and levies, to which the same are now subject and liable; and whereas, it is expedient that the same should be made subject and liable to such rates, taxes, and levies;' it was enacted, "that the same lands, buildings, messuages, yards, hereditaments, and premises, then purchased and appropriated as aforesaid, shall be subject and liable to all rates, taxes, and levies to which the same are now subject and liable, but shall not be assessed to any such rates, taxes, or levies, at a higher rate or value than that at which the same lands, buildings, messuages, yards, hereditaments, and premises are at the time of such purchase rated or assessed."

The poor of the parish of St. Philip and Jacob are managed under a local act of Parliament, 38 Geo. 3, c. lxix; and, by the 22nd section of that act, the vicar, churchwardens, and vestrymen of the parish of St. Philip and Jacob are to elect and to return to the justices acting for the district three proper persons to serve the office of overseers of the poor, who are to be appointed "for the term of three years then next ensuing."

The appointments of the defendants Barnet and Gardener were put in; but the appointment of the defendant Wait was stated to have been lost. It was proved that he had acted as overseer.

ALDERSON, B.—Acting is *prima facie* evidence.

It was proved by a witness named Chick, that he called twice on Mr. Wait by the desire of the defendant's attorney to ask him for his appointment, and that Mr. Wait said that he had lost it. The witness did not make any search for it, nor did he see Mr. Wait make any.

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Maule, for the plaintiffs.—To let in secondary evidence there ought to have been a search at the house of the party.

ALDERSON, B.—I do not see in what way a search would have carried the matter further. It would be in substance the same as inquiring of the party. It is the necessity of the case. Here is a declaration made by the party who cannot be examined to the fact. The question is, whether there is fair ground for admitting secondary evidence. I do not see how further evidence could be produced.

Parol evidence was given of the appointment of Mr. Wait. The appointment of Mr. Gardener was read. It was under the hands and seals of Mr. Parker and Captain Newman, who were magistrates, and was dated 26th March, 1832; and by it he was appointed "to be an overseer of the poor of the same parish for the space of three years next ensuing the date hereof, *or until other overseers shall be appointed* in his stead, according to the direction of the statutes in that case made and provided."

ALDERSON, B.—The appointment ought to be for three years. Does the act give a power of appointing for three years, or until a new overseer is appointed? I will not stop the case, but I think that this is a bad appointment. I will, however, save the point as to the power of the appointment.

The rates were put in; and in them the plaintiffs were

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rated for the Armoury at 100*l.* a year, and for a lace manufactory in Bread Street, (which the plaintiffs also rented), at 28*l.* a year.

It further appeared, that the Armoury had been a military depot in the hands of the crown, and that at the time the plaintiffs bought it it was not rated at all. The paupers employed in the lace manufactory were paid for their work by the plaintiffs, who sold the lace.

Ludlow, Serjt., for the defendants.—This is a manufacture for the benefit of the plaintiffs.

ALDERSON, B.—I do not think that profit is the criterion.

Maule.—It is perfectly clear that guardians of the poor are not rateable for what they occupy as such.

ALDERSON, B.—They are not beneficial occupiers any more than the guardians of St. Luke's. The object of this is to set the paupers to work. It is a literal carrying into effect the statute of Elizabeth.

Ludlow, Serjt., referred to the stat. 1 Will. 4, c. iv, (before set out), with respect to the Armoury.

ALDERSON.—The act speaks of lands, &c. then subject to rate. Now, as the Armoury was in the possession of the king, and not then subject to a rate, that clause must apply to other property, and not to the Armoury.

Maule.—There appears to be no question for the jury.

ALDERSON, B., directed a verdict for the plaintiffs.

Verdict for the plaintiffs.

Maule and *Justice*, for the plaintiffs.

Ludlow and *Talfourd*, Serjts., *M'Lean*, and *Greaves*,
for the defendants.

[Attornies—*Osborne & Ward*, and *Latham*.]

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IN the ensuing term, *Ludlow*, Serjt., moved for a rule to shew cause why there should not be a new trial, on the ground that, under the private act of Parliament, 1 W. 4, c. iv, the plaintiffs were rateable, and the Court of King's Bench granted a rule to shew cause.

(*Crown Side*)!

BEFORE MR. JUSTICE WILLIAMS.

REX v. WEBB and Another.

Aug. 15th.

THE prisoners were charged with breaking into a warehouse of Mr. B. W. Hicks, at Dursley, and stealing a large quantity of cheese.

To prove the case against the prisoners, an accomplice named Heath was called; and he stated, that, when the robbery was committed, the thieves took a ladder from the premises of Mr. Player.

To confirm the accomplice, Mr. Player's servant was called to prove that Mr. Player's ladder was taken away on the night on which this felony was committed.

Proving by other witnesses that a robbery was in fact committed, in the mode in which an accomplice states it to have been committed, is not such a confirmation of the accomplice as is required to warrant a conviction on his evidence.

Greaves, for the prosecution, proposed to call other witnesses to confirm the accomplice as to the mode in which the felony was committed.

WILLIAMS, J.—Mr. *Greaves*, you must shew something that goes to bring the matter home to the prisoners. Prov-

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ing by other witnesses that the robbery was committed in the way described by the accomplice is not such confirmation of him as will entitle his evidence to credit so as to affect other persons. Indeed, I think it is really no confirmation at all, as every one will give credit to a man who avows himself a principal felon for at least knowing how the felony was committed. It has been always my opinion that confirmation of this kind is of no use whatsoever.

Verdict—Not Guilty.

Greaves, for the prosecution.

Phillpotts, for the prisoners.

[Attornies—*Visard, B. & M.*, and *Carter*.]

See the case of *Rex v. Addis*, ante, p. 388.

WESTERN SPRING CIRCUIT, 1834.

DORCHESTER ASSIZES.

BEFORE MR. BARON WILLIAMS.

March 17th.

REX v. LOVELASS and Others.

An oath administered in an illegal society, by which the members of it are sworn to secrecy, is an unlawful oath within the stat. 37 Geo. 3, c. 123, which is not confined to oaths administered for the purposes of either sedition or mutiny.

INDICTMENT for administering an unlawful oath.—The indictment charged that the prisoners did feloniously administer and cause to be administered a certain oath and engagement, purporting to bind the person taking the same not to inform or give evidence against any associate or other person charged with any unlawful combination, and not to reveal or discover any such unlawful combination, or any illegal act done or to be done; and not to discover any illegal oath which might be taken.

A witness named Lark, who was a labourer, said—
“ One of the prisoners, whose name is Brine, came to me

while I was threshing, and persuaded me to go to Tolpuddle. I went to the prisoner Thomas Stanfield's house, up stairs. While we were there, the prisoner John Stanfield came in; he asked if we were all ready. Some one answered, that we were; and he said, then, blind your eyes. We all then tied our handkerchiefs round our eyes, and, being thus blindfolded, we were led into another room, where something was read to us by some person whom I did not know. I think, from the reading of it, it was out of the Bible; I don't recollect any part of it. We then knelt down, when a book was put into our hands, and an oath administered to us. I don't recollect what the oath was about. We then rose up and were unblinded, when the picture of death, or a skeleton, was shewn to us, upon which the prisoner James Lovelass said, 'Remember your end!' We were then blinded again, and again knelt down, when something was read out of a paper, but what that was I don't remember. I kissed a book when I was unblinded first. I saw George Lovelass dressed in white; he had on him something like a parson's surplice. Something was said about the rules of the society, and about paying one shilling on admission. I saw all the prisoners there when I was unblinded."

Another witness, named Edward Legg, said—"I went with the last witness; they told us something about striking, or that they meant to strike, and that we might do the same if we liked. There was nothing said about the time when we should strike. There was something said about our masters having notice of it, but I don't remember any thing about it. We kissed a book when we were blinded. When we were on our knees, we repeated something that was said by somebody, but who said it I don't know. I believe it was like the voice of James Lovelass. I think the words which we repeated were something about being plunged into eternity, and about keeping secret what was done by the society. I don't know what book it was that I kissed. When I was unblinded I saw a book on the

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table that resembled a Testament. They shewed us the picture of death, and one of them said, 'Remember your end!'

It was proved, that, in a box belonging to the prisoner James Lovelass, was found a book, which was headed "General Rules." The first rule was, "That this society be called 'The General Society of Labourers.'" The substance of the rules was, that there should be a lodge in every parish, a committee, a grand lodge, and contributions to support those who quit their work when desired by the grand lodge. That no person should turn out for an advance of wages without the consent of the grand lodge. That no member of the society should work along with any man who acted contrary to any rule prescribed by the grand lodge. That if any man divulged any of the secrets of the society, his name and description should be sent round to all the lodges, and all members should decline to work along with him. That no person should be admitted to their meetings when drunk; that no obscene songs or toasts should be allowed; and that they should not countenance any violence or violation of the laws of the realm.

Butt, for the prisoners, Brine, Hemmett, and John Stanfield.—I submit that this is not a case within the stat. 37 Geo. 3, c. 123, which is confined to mutinous and seditious societies. If this society came within that statute it would equally apply to all lodges throughout the kingdom.

Derbshire, for the other prisoners.—The stat. 37 Geo. 3, c. 123, was passed to protect soldiers and sailors from the seductions of persons who were then supposed to be conspiring to overthrow the British monarchy on behalf of a foreign enemy, and who were, as the preamble of the act states, engaged in administering illegal oaths, for the purpose of binding the consciences of their victims to embark in such treasonable projects. The

case of *Rex v. Marks* (a) is distinguishable from the present. There, certain workmen had formed themselves into a committee to coerce and control other workmen in the same line, and compelled their fellow workmen to take an oath binding them to pursue a certain line of conduct. That was not so in the present case. The rules and regulations put in shew that the object of this society was similar to that of a friendly society, it being to form a fund, a sort of agricultural saving bank, out of which succour might come in time of need. There is no evidence of any oath. Something has been said about eternity; but the witnesses know not what. There is no evidence to shew that the society was illegal; and if it was not, could the oath be illegal?

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WILLIAMS, B., (in summing up).—If you are satisfied that an oath, or obligation tantamount to an oath, was administered to either of the witnesses Legg or Lock by means of the prisoners, you ought to find them guilty. The prisoners are indicted under the stat. 37 Geo. 3, c. 123, the preamble of which refers to seditious and mutinous societies; but I am of opinion that the enacting part of the statute extends to all societies of an illegal nature: and the second section of the stat. 39 Geo. 3, c. 79, enacts that all societies shall be illegal, the members whereof shall, according to the rules thereof, be required to take an oath or engagement not required by law. If you are satisfied from the evidence respecting the blind-

(a) 3 East, 157, cited Chitty's *Burn's Justice*, tit. "Oaths." In that case Mr. Justice Lawrence says, "It is true that the preamble and the first part of the enacting clause are confined in their objects to cases of mutiny and sedition; but it is nothing unusual in acts of Parliament for the enacting part to go beyond the

preamble. The remedy often extends beyond the particular act or mischief which first suggested the necessity of the law; and here the latter part of the clause is conceived in general terms, without any word of reference to the immediate objects of mutiny or sedition before mentioned."

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ing, the kneeling, and the other facts proved, that an oath or obligation was imposed on the witnesses, or either of them, you ought to find the prisoners guilty; and if you come to that conclusion, I wish you to state whether you are of opinion that the prisoners were united in a society.

The jury found the prisoners Guilty; and stated, that they were of opinion, that, at the time of administering the oath, the prisoners were members of a society, and bound by an oath not to disclose the secrets of the society.

Butt and *Derbshire* asked the learned Baron to reserve the case for the consideration of the fifteen Judges, on the ground that there was no evidence to shew that the society was formed for illegal purposes.

WILLIAMS, B.—I will consider of it.

March 19th.

THE learned Baron said, that he had considered of the objections which had been made, and had come to the conclusion that they were not well founded (a). His

(a) In the case of *Rex v. Moors*, 6 East, 419, n., it was held that an indictment charging that the defendants administered to J. H. an oath, intended to bind him "not to inform or give evidence against any member of a certain society, formed to disturb the public peace, for any act or expression of his or theirs," &c., is good, without alleging the tenor or purport of the oaths to be set forth, and without shewing in what manner the public peace was meant to be disturbed by such society. And in the same case it was also held, that, where the oath

on the face of it did not purport to be for a seditious purpose, evidence might be given to shew that the "brotherhood" there referred to was a seditious society:—Held, also, that where the witness, swearing to the words spoken by way of oath by the prisoner when he administered the same, said, that the prisoner held a paper in his hand at the same time when he administered the oath, from which it was supposed that he read the words, yet that parol evidence of what the prisoner in fact said was sufficient without giving him notice to produce such paper.

Lordship sentenced the prisoners to be each transported for seven years (a).

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Gambier and *Barstow*, for the prosecution.

Butt, for the prisoners John Stanfield, Brine, and Hemmett.

Derbshire, for the other prisoners.

[Attornies—*Coombs*, and *G. Chitty*.]

(a) This case was afterwards the subject of discussion in the House of Commons, and much interest was made to procure a remission of the sentence; however, the sentence was carried into effect, and the prisoners were sent to New South Wales.

NORFOLK SUMMER CIRCUIT, 1834.

BEFORE MR. JUSTICE GASELEE AND MR. JUSTICE BOSANQUET.

CAMBRIDGE ASSIZES.

BEFORE MR. JUSTICE BOSANQUET.

REX v. DIXON and Another.

July 23rd.

INDICTMENT on the stat. 57 Geo. 3, c. 19, s. 25 (a), for becoming members of a society, the members whereof bound themselves by an oath, in consequence of becoming members of the said society.

In some of the counts of the indictment, the purport of the oath was set forth, and others merely followed the terms of the statute, omitting to set forth the purport of the oath.

Every person who engages in an association, the members of which, in consequence of being so, take any oath not required by law, is guilty of an offence within the stat. 57 Geo. 3, c. 19, s. 25.

Gunning, for the prosecution, stated that, in March,

(a) Set forth ante, p. 564, n.

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1834, there existed in Cambridge a trade's union of the operative cordwainers of that town; the object of which was to make a powerful confederacy, under the pretence of protecting labour, and the members of which were bound by an oath not to disclose the secrets of the association. He further stated, that, as the union was dissolved, he should offer no evidence on this indictment.

BOSANQUET, J.—I have no hesitation whatever in saying, that confederacies like that which appears to have existed in the present case are as decidedly in contravention of the law of the land, as they are pregnant with mischief to the community and to the working classes themselves. It is for the sake of those who belong to associations like that of the late Cordwainers' Union of Cambridge, that I now declare, that all who engage in associations, the members of which, in consequence of being so, take any oaths not required by law, are guilty of an offence against the statute, which, if clearly proved, would, upon conviction, be in every case followed by exemplary punishment. It is impossible that any well-ordered state of society could tolerate the existence of confederacies bound together by secret compacts and oaths not required by law; one of the obvious consequences of such confederacies being to deprive the state of the benefit of the testimony of those who are engaged in them—a state of things injurious to individuals, subversive of public order, and striking at the very existence of the state, by withdrawing the allegiance of the subject from the laws of the land to the secret tribunals of unlawful societies, constraining the conscience by oaths, and seeking to obtain their objects, whatever they might be, by popular intimidation.

Verdict—Not Guilty.

Gunning, for the prosecution.

Austin, for the prisoners.

[Attornies—*Fisher*, and *Prior*.]

WELSH SUMMER CIRCUIT, 1834.

BEFORE MR. JUSTICE VAUGHAN AND MR. BARON PARKE.

CARDIFF ASSIZES.

BEFORE MR. BARON PARKE.

TALBOT *v.* LEWIS.

TRESPASS for breaking and entering the plaintiff's close, and entering on certain sands, called the Rossilly Sands, in the parish of Gower, and taking Spanish dollars. Plea—Not Guilty (*a*).

The plaintiff was the lord of the manor of Landemore, in which these sands are situated, and the defendants were labourers, who with others had come from Carmarthenshire, and the sea being very low, and the sands left dry, they had turned up the sand with their hands, and found a great number of Spanish dollars, which were supposed to have belonged to a Spanish ship, which had been wrecked there (as was supposed) about a century ago. The dollars having on some of them the date of 1631, others bearing earlier dates. The plaintiff claimed the dollars as being entitled to wreck within this manor; and, to shew his title to wreck, the plaintiff's counsel proposed to give in evidence an ancient document, which was brought from the muniment room of the plaintiff. This document purported to be a survey of the manor, made in the year 1635, at a court of survey held before certain commissioners nominated by the then lord of the manor and a jury. In this survey the boundaries of the manor were set forth, and the rights of the manor were also set

If Spanish dollars more than one hundred years old be found in the sands of a sea shore, it will be presumed that they came there by the loss of some vessel which was wrecked, although no part of any vessel be found near them.

An ancient survey of a manor made before commissioners appointed by the lord of the manor, and a jury of the tenants of the manor, is admissible as evidence to shew the boundaries of the manor; but is not admissible as evidence of the lord's title to wreck.

(*a*) This plea was pleaded before the rules of H. T. 4 Will. 4 came into operation.

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forth, as presented by that jury; and, after describing the boundaries of the manor, it was presented by the jury (*inter alia*) that the lord of the manor was entitled to wreck on the sands in question.

PARKE, B.—I think that this document is evidence to shew the boundaries of the manor; and I am of opinion that it is evidence for that purpose, as being the opinion of persons whom we must presume to have been cognizant of the facts, it having reference to a subject on which reputation is evidence. But I think it is not evidence to prove the lord's title to wreck. Wreck is not a matter of a public nature; and, as it is a matter in which the inhabitants have no concern, it cannot be proved by shewing what were their opinions, or what was the reputation among them.

Evidence was given, that the plaintiff's steward had received sums amounting to a few pounds on account of two wrecks.

E. V. Williams, for the defendants.—Even if the plaintiff was entitled to wreck, *non constat* that these dollars came from a wreck. There is no part of any vessel found, and this may be a case of treasure-trove.

PARKE, B.—These Spanish dollars could not have dropped from the clouds; and, as they are found in the sands of a sea shore, they must be presumed to have come there from the loss of some vessel.

E. V. Williams addressed the jury for the defendants; and submitted, that, as the plaintiff's right to wreck could only exist by a grant from the crown, it was manifest that he had no such right, or some evidence would have been given of such a grant, especially as the plaintiff kept a room in which other documents respecting the manor were deposited.

PARKE, B., left it to the jury to say, whether the plaintiff had made out his title to wreck to their satisfaction.

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Verdict for the defendants.

Wilson and *Whitcombe*, for the plaintiff.

E. V. Williams and *R. C. Nicholl*, for the defendants.

[Attornies—*Jenkins*, and *John Davies*.]

COURT OF EXCHEQUER.—BEFORE LORD LYN-
HURST, C. B., PARKE, B., ALDERSON, B., GURNEY, B.

Wilson applied for a rule to shew cause why there should not be a new trial, on two grounds—*first*, that the verdict was against evidence; and, *second*, that the survey of the manor was receivable in evidence to prove the plaintiff's title to wreck.

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PARKE, B.—I held the presentment of the jury admissible to prove the boundaries of the manor, but not to prove the lord's right to wreck.

Wilson submitted that this was a public right, as it affected all the shipowners who used the Bristol Channel; and that, from the nature of the subject, it was one in which the public was interested; and that, therefore, reputation would be evidence. He cited Sir *H. Constable's* case (a).

PARKE, B.—If there is any thing in your argument, reputation from anybody would be evidence.

Wilson.—This is a presentment by a jury of the manor.

(a) 5 Co. 106. In that case the law of wreck is very much discussed. See also Com. Dig. tit. "Wreck," and the stats. 1 & 2 Geo. 4, cc. 75, 76.

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Lord LYNDHURST, C. B.—If a lord of a manor has a right to wreck, he has that right either by a grant from the crown, or by prescription, which presumes such a grant. In this right the tenants of the manor have no interest whatever, and their presentment respecting it is not evidence. As the learned Baron who tried the case is dissatisfied with the verdict, there must be a rule for a new trial on the first ground.

ALDERSON, B.—We think that the learned Baron was right in rejecting the evidence. The right to wreck can only be in the lord of the manor by grant, or prescription, which presumes a grant. In a case of prescription is reputation evidence? I think not.

GURNEY, B.—I am of the same opinion.

Rule granted on the first ground only.

CARMARTHEN ASSIZES.

BEFORE MR. BARON PARKE.

—♦—
 REX v. EVAN REES and MARY REES.

On the trial of a person on the stat. 52 Geo. 3, c. 143, s. 2, for embezzling a letter containing a bill of exchange, he being at the time employed under

the Post-office, it is sufficient to prove that such person acted in the service of the Post-office, and it is not necessary to go into proof of his appointment.

INDICTMENT on the stat. 52 Geo. 3, c. 123, s. 2 (a), for embezzling a letter containing a bill of exchange for 120*l.*, the prisoners being employed under the Post-office.

It appeared that, on the 25th of February, 1834, Mrs. Griffiths sent a letter, containing a bill of exchange for

(a) Set out ante, Vol. 4, p. 572.

120l., for her son, who was in India, to the Post-office at Ferryside, and that another of her sons, who took it to Ferryside, paid the female prisoner at the Post-office there 2s. 4d. as postage. It further appeared, that, in the following April, the male prisoner returned the letter opened, and the female prisoner offered to return the postage. It was proved by the postmaster at Carmarthen that he had appointed the prisoner, Evan Rees, postmaster of Ferryside; and that that appointment was sanctioned by the postmaster-general, and that the prisoner, Evan Rees, had been postmaster there for three years. This witness further stated, that the letter ought in due course to have been sent to Carmarthen, which in fact it never had been. The prisoner, Mary Rees, was the wife of the other prisoner.

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E. V. Williams, for the prisoners.—I submit that this indictment cannot be supported as against the female prisoner. To support this indictment the person accused must be employed by or under the Post-office, and the person must be shewn to be a public officer. Now, in this case, the female prisoner merely acted as an assistant to her husband in his absence. In the case of *Rex v. Pearson (a)*, a shop-boy of the postmaster, who assisted in tying up the letter-bag, was held not to be within the stat. 52 Geo. 3, c. 123, s. 2. Upon this evidence it may be that the wife committed the offence, and the husband returned the letter as soon as he discovered the fraud. With respect to the husband, he was, it appears, appointed by the postmaster of Carmarthen, and, as the appointment was in writing, it ought to have been produced.

PARKE, B.—It is sufficient to shew that the prisoners have acted as servants of the Post-office. It is, however, on this evidence impossible to say which of the prisoners

(a) Ante, Vol. 4, p. 572.

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embezzled either the letter or the bill, they must therefore both be acquitted.

Verdict—Not guilty.

Sockett, and *Wilson*, for the prosecution.

E. V. Williams, for the prisoners.

[Attornies—*Peacock*, and ——.]



The Mayor and Burgesses of CARMARTHEN v. LEWIS.

ASSUMPSIT for the use and occupation of “standings, market-places, and sheds.” Plea—Non assumpsit (*a*).

On the part of the plaintiffs, an agreement, signed by the defendant, was put in. It related to a demise of “tolls” by the plaintiffs to the defendant.

Whitcombe, for the defendant.—This agreement does not apply. It relates to tolls; and the declaration is for the use and occupation of “standings, market-places, and sheds.”

PARKE, B.—I shall allow the declaration to be amended by inserting the word “tolls,” the plaintiff paying the costs of the amendment.

It appeared that the defendant collected rent and tolls from different butchers, who occupied about seventy stalls in Carmarthen-market, and who paid upon an average about 1s. per stall weekly; and that the defendant had done this from the month of October, 1831, till the time of the trial.

(*a*) This plea was pleaded before the rules of H. T. 4 Will. 4 came into operation.

A corporation aggregate may maintain assumpsit for the use and occupation of tolls, although they did not grant the tolls to the occupier by any instrument under their common seal.

If a corporation aggregate sue for use and occupation of “standings, market-places, and sheds,” and it appear that they allowed the defendant to take tolls from others who occupied sheds and standings, the Judge at the trial will allow the word “tolls” to be inserted in the declaration, the defendant paying the costs of the amendment.

Whitcombe.—This agreement is not under the seal of the corporation.

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J. Evans, for the plaintiff, cited the case of the *Mayor of Stafford v. Till (a)*, in which it was held that a corporation might sue in assumpsit for use and occupation, where a tenant had held under them, and paid rent.

Whitcombe.—A corporation may maintain assumpsit for the use and occupation of buildings, but I should submit not for tolls. The case cited was a case of buildings.

PARKE, B.—There is nothing in that distinction. Tolls are no doubt an incorporeal hereditament, and so are tithes; and you can maintain an action for the use and occupation of tithes.

Whitcombe.—As the corporation did not grant under their common seal, no interest passed.

PARKE, B.—Though no interest passed, you occupied, and ought to pay.

The defence was, that the plaintiffs had taken a part of the market-place, and converted it into a cheese-market, and that they would not assist the defendant in collecting the dues.

Verdict for the plaintiffs—Damages,
236*l.* 2*s.* 8*d.*

J. Evans, and *E. V. Williams*, for the plaintiffs.

Whitcombe, for the defendant.

[Attornies—*Jones & Jefferies*, and *G. Thomas*.]

(a) 12 Moo. 260. That was an action for the use and occupation of a house and premises, and the Court there held that a corporation aggregate might maintain assumpsit for use and occupation, where the tenant has occupied premises under them, and paid rent.

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If a tenant makes an encroachment adjoining to the farm he rents, this encroachment will be for the benefit of his landlord, unless it appear clearly from some act done at the time that the tenant intended to make the encroachment for his own benefit, and not to hold it as he held the farm.

DOE on the Demise of LEWIS v. REES.

EJECTMENT.—The lessor of the plaintiff had been the landlord of the defendant, the latter having rented a farm of the former; and this ejectment was brought to recover a piece of land encroached from the sea-coast by the defendant, while tenant to the lessor of the plaintiff of this farm, which did not extend quite down to the sea-shore till the defendant made the encroachment in question.

PARKE, B.—It is clearly settled that encroachments made by a tenant are for the benefit of his landlord, unless it appear clearly, by some act done at the time of the making of the encroachments, that the tenant intended the encroachments for his own benefit, and not to hold them as he held the farm to which the encroachments were adjacent.

Verdict for the plaintiff.

Chilton, and *J. Evans*, for the lessor of the plaintiff.

Whitcombe, and *E. V. Williams*, for the defendant.

[Attornies—*James & Co.*, and *Hugh Williams*.]

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SCOTT, Assignee of BENJAMIN THOMAS, a Bankrupt, v.
DAVID THOMAS.

TROVER for farming stock by the plaintiff, as assignee of the bankrupt. Pleas, *first*, not guilty; *second*, that the plaintiff is not assignee of the said B. T., a bankrupt; *third*, that the plaintiff was not lawfully possessed of the goods as of his property as such assignee (a).

To prove the plaintiff's title as assignee, the fiat of bankruptcy inrolled, the certificate of the appointment of the plaintiff as assignee, and the appointment itself (both having been inrolled), were put in.

PARKE, B.—Since the passing of the Bankrupt Court Act (b) I think that this proof is sufficient.

On the part of the plaintiff it was proposed to put in a written statement, given by the bankrupt, before his bankruptcy, to Mr. Vaughan, one of the witnesses, in

If in trover by the assignee of a bankrupt the plaintiff's title as assignee be put in issue—the fiat of bankruptcy inrolled, the certificate of the appointment of the plaintiff as assignee inrolled, and the appointment itself (also inrolled) are sufficient proof that the plaintiff is assignee.

A written statement, made by the bankrupt before his bankruptcy, of his debts and credits, is evidence as shewing that he knew of his own insolvency.

Personal property may be transferred for a sufficient consideration, without writing, if the possession be also transferred; and a debtor may prefer one creditor to another, if the debtor be not a trader; but if he be a trader he cannot prefer one creditor to another, unless he be pressed.

A fraudulent delivery of goods by a trader will be of itself an act of bankruptcy. A delivery of goods to one to whom no debt was due would be such a fraudulent delivery; and the delivery would likewise be fraudulent, though a debt was due, if the transfer of the goods was made voluntarily; and in contemplation of bankruptcy.

(a) As the forms may be useful in practice we have subjoined them:—

And for a further plea in this behalf the said defendant saith, that the said plaintiff is not assignee of the estate and effects of the said Benjamin Thomas, a bankrupt, according to the said several statutes concerning bankrupts, in manner and form as the said plaintiff hath above in his said declaration in that behalf alleged, and of this the said defen-

dant puts himself upon the country &c.

And, for a further plea, the said defendant saith, that the said plaintiff was not lawfully possessed of the said goods and chattels, as of his property as such assignee as aforesaid, in manner and form as the said plaintiff hath above in his said declaration in that behalf alleged, and of this the said defendant puts himself upon the country, &c.

(b) 1 & 2 Will. 4, c. 56.

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DOE on the demise of WILLIAMS v. DAVIES.

A lease contained a proviso for re-entry, if the lessee, "his executors or administrators, or either of them," should become bankrupt. The executor of the lessee became bankrupt:—Held, that the landlord was entitled to recover in ejectment, although a term vested in a person as executor does not on his bankruptcy pass to the assignees.

EJECTMENT on a forfeiture of a lease, the defendant having been the under-tenant of the lessee.

The lease contained a proviso, that, if the lessee, "*his executors or administrators, or either of them,*" should become bankrupt, the lessor should re-enter.

It appeared that the lessee had died, and that his executor had become bankrupt.

Whitcombe, for the defendant, submitted that the intention of the parties evidently was, that the lease should be at an end in the event of a bankruptcy, that the property might not pass into the hands of assignees; but that in this instance the reason ceased, as this property would not pass to the assignees of the executor, as the executor here did not become bankrupt in his capacity of executor. He cited the case of *Thompson v. Andrews (a)*.

PARKE, B.—Where the words are so clear, we cannot go into the question as to the intention of the parties. The parties must be bound by their own express stipulation, however absurd we may think it.

Verdict for the plaintiff.

Wilson, and *J. Evans*, for the lessor of the plaintiff.

(a) 1 Myl. & K. 116. In that case it was held by Sir *J. Leach*, M. R., that where a testator directs his trade to be carried on after his death; that part only of his property will be liable, in case of bankruptcy, which he has directed to be embarked in the trade. In the case of *Ex parte*

Garland, 10 Ves. 110, Lord *Eldon* held, that, under the bankruptcy of an executor and trustee, directed by the will to carry on a trade, and a limited sum to be paid to him for that purpose, the general assets of the testator beyond that sum were not liable.

Whitcombe, and *E. V. Williams*, for the defendant.

[Attornies—Cook & Son, and *Vaughan & Bevan*.]

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IN the ensuing term, *E. V. Williams* applied to the Court of Exchequer for a rule to shew cause why there should not be a new trial; but the Court refused a rule.

Haverfordwest Assizes.

BEFORE MR. BARON PARKE.

THOMAS, Executor of THOMAS, *v.* HARRIES, Executor of HARRIES.

GOODS sold and delivered. Plea—general issue.

It appeared that the plaintiff's testatrix was the landlady of an inn at Haverfordwest, the defendant's testator having been a farmer in the county of Pembroke. It further appeared, that, at the election of a member of parliament for the county of Pembroke, the voters in the interest of Mr. Fulke Greville, the unsuccessful candidate, were supplied with refreshments by the plaintiff's testatrix, by order of the defendant's testator; but there was contradictory evidence, whether, in giving the order, the defendant's testator said "Give things to the voters and I will pay," or "I will see you paid;" and it was proved by one of the witnesses for the defendant that the plaintiff's testatrix had said, that, if Mr. Greville did not pay her, she feared she should not get the money.

If a person who is not himself a candidate, and who is not known to the party who supplies refreshments to be an agent of a candidate, open a public-house at an election, and orders supplies for the voters, he is personally liable to pay, and the Treating Act, 7 & 8 W. 3, c. 4, will afford him no defence if the goods were supplied entirely on his credit.

PARKE, B., (in summing up).—If a person who is not

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himself a candidate, and who is not known to the party who supplies the refreshments to be the agent of a candidate, open a public-house at an election, and orders supplies for the voters, he is personally liable to pay; and the stat. 7 & 8 Will. 3, c. 4, (commonly called the Treating Act), will afford him no defence, provided that the goods were furnished entirely on the credit of the person who so ordered them.

His Lordship left the case to the jury on the question to whom credit was given.

Verdict for the defendant, on the ground that the refreshments had not been supplied to the voters on the credit of the defendant's testator.

Whitcombe, and E. V. Williams, for the plaintiff.

J. Evans, and C. Powell, for the defendant.

[Attornies—*Evans, and Harries.*]

HIGGON v. MORTIMER.

If a tenant of land, during his tenancy, remove a dung-heap, and, at the time of his so doing, digs into and removes virgin soil that is beneath it, the landlord may maintain either trespass *de bonis asportatis* or trover for the removal of the virgin soil.

TROVER for earth and soil carried away by the defendant, and converted to his own use. Plea—Not guilty (*a*).

It appeared that the defendant had been a tenant of a farm, of which the plaintiff was the landlord; and that, a short time before the tenancy expired, the defendant took away a dung-heap, which belonged to him, and which was on the premises; and it was alleged, on the part of

(*a*) This plea was pleaded before the rules of H. T. 4 Will. 4. came into operation.

the plaintiff, that, in taking away this dung-heap, the defendant had dug a spade's depth into the virgin earth that was beneath the dung-heap, and had taken away a quantity of the earth with the dung.

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J. Evans and *E. V. Williams*, for the defendant, submitted, that, as the defendant was the plaintiff's tenant of this land, and the earth, if taken at all, was taken during the tenancy, trover would not lie.

PARKE, B.—The wrongful act of a party otherwise entitled to possession frequently revests the right of possession in him who has the right of property. I am of opinion, that, if a tenant, during the tenancy, remove virgin soil, it becomes, by operation of law, the personal property of the landlord, and is so completely revested in him as to enable him to maintain trespass *de bonis asportatis*, and, *à fortiori*, trover.

The defence was, that the defendant had only taken away the dung, and had not removed any of the plaintiff's soil.

Verdict for the defendant.

Chilton, *Herbert Jones*, and *R. C. Nicholl*, for the plaintiff.

J. Evans, and *E. V. Williams*, for the defendant.

[Attornies—*George*, and *Gwynne*.]

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JOHN v. CURRIE.

In trespass for taking "mirrors and handkerchiefs," the defendant justified the taking of the mirrors; but by mistake omitted to justify the taking of the handkerchiefs:—Held, that this omission could not be amended on the trial.

TRESPASS for taking mirrors and handkerchiefs. Pleas—*first*, not guilty, to the whole declaration; *second*, as to the taking of the mirrors, a justification as a distress for tolls. Replication—*de injuria*.

As soon as the cause was called on—

J. Evans, for the defendant, applied for leave to amend the second plea, by inserting the words "and handkerchiefs," so as to make that plea a justification of the taking of the handkerchiefs, that part of the plea having been omitted by mistake.

Chilton, for the plaintiff.—I submit that the stat. 3 & 4 Will. 4, c. 42, s. 23 (a), does not authorize an amendment of this kind.

PARKER, B., (having referred to the act of Parliament)—I find that I have no power to order an amendment, except where there is a variance between the evidence and the record. This is not a variance, but an omission in the record.

The amendment was not made.

Verdict for the plaintiff—Damages, 6*d*.

Chilton, and *E. V. Williams*, for the plaintiff.

J. Evans, and *Whitcombe*, for the defendant.

[Attornies—*Lewis*, and *Evans*.]

(a) Set forth ante, p. 531, n. (a).

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DAVIES *v.* EVANS.

ASSUMPSIT for work and labour in repairing a road near the Royal Dock at Pater. Plea—that the promise “was made to the plaintiff and one John Scurfield, and not to the plaintiff alone.” Replication—that the promise “was made to the plaintiff alone, and not to the plaintiff and John Scurfield.”

J. Evans, for the plaintiff, submitted that the defendant ought to begin, as the affirmative of this issue was upon the defendant.

PARKE, B.—I am of opinion that the plaintiff ought to begin.

The plaintiff’s counsel went into their case.

For the defendant, it was proposed to call Scurfield as a witness, to prove that the contract had been entered into by the defendant with the plaintiff and himself jointly.

J. Evans, for the plaintiff.—I submit that this witness is incompetent, on the ground of interest, as he in fact comes here to make out that half the money was due to himself.

Whitcombe, for the defendant.—If this witness succeeds in defeating the present claim by the plaintiff alone, he will not be benefited; neither, if the plaintiff succeeds, will he lose any right of action he may have at present against the defendant.

PARKE, B.—I think that he is a competent witness to prove that the contract was made with the plaintiff and himself jointly.

In assumpsit for work and labour the defendant pleaded that the “promise was made to the plaintiff and J. S., and not to the plaintiff alone.” Replication, that the “promise was made to the plaintiff alone, and not to the plaintiff and J. S. :”—Held, that on this issue the plaintiff ought to begin:—Held, also, that J. S. was a competent witness for the defendant, to prove that the contract was entered into by the defendant with the plaintiff and himself jointly.

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The witness was examined.

Verdict for the plaintiff.

J. Evans, and *E. V. Williams*, for the plaintiff.*Whitcombe*, and *James*, for the defendant.[Attornies—*Parry*, and *Summers*.]

CARDIGAN ASSIZES.

BEFORE MR. BARON ALDERSON.

SAMUEL v. MORRIS and GRIFFITHS.

A. had pledged goods to B. for a debt. B. died, and the parish officers took the goods, and gave them to J., the carpenter who made the coffin of B., on condition of his paying B.'s rent and the funeral expenses:—Held, that, by taking these goods, the parish officers became ex-ecutors *de son*

tort; and that, if they sold the goods to J., they would be liable to A. in trover, because such a sale was so inconsistent with the bailment, as to re-vest the right of possession in A. But, if the parish officers merely relinquished their possession, and let J. take possession, this would not make the parish officers liable in trover; as, in this case, a mere seizure of the goods by a stranger, who afterwards relinquished them, would not be a conversion.

If a defendant in trover plead that the goods "are not nor were the *property*" of the plaintiff, in manner and form as in the declaration is alleged, (concluding to the country), this will be taken to be an informal plea, traversing the allegation of the declaration, that the plaintiff "was possessed" of the goods "as of his own property;" and, therefore, on this plea, it will be a good defence to shew that the goods, though the property of the plaintiff, had been pledged by him as a security for money. But whether this plea would not be bad on special demurrer—*quære?*

TROVER for articles of household furniture.—The defendants pleaded, *first*, Not guilty; and, *second*, that the goods and chattels in the declaration mentioned "are not, nor were, nor was or is any or either of them the property of the said plaintiff, in manner and form as he hath above in the said declaration in that behalf alleged, and of this they the said defendants put themselves upon the country, &c."

It was proved on the part of the plaintiff, that the goods in question belonged to him, and that, being on the pre-

mises of one James, a pauper, they were, on James's death, seized by the defendants, who were the overseers of the poor of the parish in which he resided (together with James's own goods), in order, as they alleged, to defray the expense of his funeral.

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It further appeared, that the defendants ordered a person named Joseph to make a coffin for the deceased; and, on his bringing in the bill for the coffin, and saying that there was something due to another person for trimmings, the defendants offered to let him have all the goods, to make what he could of them, if he would pay the rent due from the pauper, James, and all the funeral expenses. To this proposal Joseph assented, and took the goods, and sold them.

The defendants, in order to shew, that, at the time of the seizure of the goods, the plaintiff was not entitled to the possession of them, gave evidence of their having been pledged by the plaintiff to James, as a security for money lent by James to the plaintiff.

Chilton, for the plaintiff.—Whether the goods were pledged or not is quite immaterial on these pleas. The issue raised by the second plea is, whether the goods were the property of the plaintiff, and not whether he was entitled to the possession of them. A bailment for money lent does not divest the right of property, although it divests the right of possession.

PARKE, B.—I think that this must be taken to be an informal plea, traversing the allegation in the declaration, that the plaintiff “was possessed” of the articles in question “as of his own property.” It might have been bad on special demurrer; but I think it raises the question of right of possession, as well as the question of right of property.

Chilton.—At all events, the defendants had no right ab-

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olutely to sell the goods, and thus deprive the plaintiff of his right to redeem them.

PARKE, B.—You have not brought an action on the case for a wrongful sale; however, I think that the case may be viewed in this way. The defendants, by taking the goods on the death of the pauper, became executors *de son tort*, and, therefore, stood in the same situation as he himself would have done, if alive. Now, if he had sold the goods, it would have been such a wrongful act, and so inconsistent with the bailment, as to have immediately revested the right of possession, by operation of law, in the bailor; and I am inclined to think that the defendants' doings had a similar effect (a).

E. V. Williams, for the defendants.—I submit that the evidence does not shew a conversion by the defendants. A mere seizure is not, *per se*, a conversion; and, as to the defendants giving up the goods to Joseph, on his undertaking to pay the funeral expenses and rent, that was no sale, but a relinquishment to him of their executorship *de son tort*, supposing them before to have acquired the character of such executors.

PARKE, B.—The question is, whether the defendants seized the goods in the character of executors *de son tort*, and for the purpose of administering them; as trover will not lie in this case for a seizure by a mere stranger.

Whitcombe addressed the jury for the defendants.

PARKE, B., (in summing up).—This is a case in which there are several nice points of law. The conversion relied upon by the plaintiff is the transferring of these goods

(a) For the authorities respecting executors *de son tort*, see *Williams' Law of Ex. and Ad.* 136 *et seq.*, and 601.

to Joseph. The defendants say that this transfer was not a sale to Joseph, but an agreement that Joseph should stand in their place, and take the goods, and pay the debts of the deceased. If that was the understanding, this was no conversion by the defendants. There are two questions for your consideration, which are, first, were these goods pledged to James by the plaintiff as a security for money lent? and, second, were the goods sold by the defendant to Joseph, or did he merely undertake to stand in the place of the defendants?

The jury having consulted together, the foreman said—
“We think that the goods were pledged with James, and that the defendants, by their agreement with Joseph, meant to get rid of the business altogether.”

PARKE, B.—Then there must be a verdict for the defendants, as there was no conversion.

Verdict for the defendants.

Chilton, and James, for the plaintiff.

Whitcombe, and E. V. Williams, for the defendants.

[Attornies—*Evans, and George.*]

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BRECON ASSIZES.

BEFORE MR. BARON PARKE.

DAVID v. GRENFELL and Others.

On the trial of an action for a nuisance, a witness for the plaintiff may be asked whether he has not heard the plaintiff say that he had preferred eight indictments against the proprietors of the works, which in the present action were charged to be a nuisance:—Held, also, that a witness might be asked what he had heard the plaintiff say when the plaintiff was examined as a witness on the trial of one of those indictments.

CASE for a nuisance. Plea—Not guilty (*a*).

The nuisance complained of was, that the defendants, being the proprietors of the Middle Bank Copper Works, smelted copper ore there, which emitted gases which were alleged to be prejudicial to animal and vegetable life. The plaintiff was the occupier of three farms, called Bonmaen, Tyrgwillt, and Tyrcrew, within a mile of the works; and it was alleged that the gases from the smelting of the copper were injurious to the plaintiff's farms.

On the part of the plaintiff several witnesses were called; and the defendants' counsel wished to ask one of them whether he had not heard the plaintiff say that he had preferred eight indictments against the proprietors of these works.

E. V. Williams, for the plaintiff.—I must object to that question. This is not the way to prove an indictment. There was a case (*b*) in which Lord *Ellenborough* decided that a witness could not be asked whether the plaintiff had not said that he had been discharged under the Insolvent Debtors' Act.

PARKE, B.—I am clearly of opinion that the question may be put.

The question was put.

(*a*) This plea was pleaded before the rules of H. T. 4 Will. 4 came into operation.

(*b*) The case of *Scott v. Clare*, 3 Camp. 236.

It was proposed by the defendants' counsel to ask a witness for the plaintiff, what he had heard the plaintiff say when the latter was examined as a witness on the trial of one of the indictments against these works.

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E. V. Williams.—I submit that that cannot be asked without first putting in the record of the trial of that indictment.

PARKE, B.—I am of opinion that the question may be put.

The question was put.

Verdict for the plaintiff.

E. V. Williams, and *R. C. Nicholl*, for the plaintiff.

J. Evans, and *Whitcombe*, for the defendant.

[Attornies—*Meyrick & Davies*, and *Mansfield*.]

IN the ensuing term the Court of King's Bench granted a rule to shew cause why there should not be a new trial, but on grounds quite distinct from the points of law above mentioned.

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OLD BAILEY OCTOBER SESSION, 1834.

BEFORE MR. SERJEANT ARABIN.

Oct. 18th.

REX v. WILLIAMS.

If a servant be indicted under the stat. 7 & 8 Geo. 4, c. 29, for embezzlement, and the indictment contain only one count, charging the receipt of a gross sum on a particular day, if it turn out that the money was received in different sums, on different days, the prosecutor must make his election, and confine himself to one sum and one day; and if the money was paid to the prisoner as the servant of the prosecutor, it will be sufficient, although the payment was made by one of a class of customers of whom the prosecutor did not authorize the prisoner to receive money.

THE indictment, which consisted of only one count, charged the prisoner with receiving on a certain day the sum of eleven shillings and ten-pence on account of his master, and embezzling and stealing the same, against the statute (a).

From the evidence, it appeared that the prisoner had received money in different sums upon different days, amounting in the whole to the sum mentioned in the indictment, and the prosecutor stated, that he never employed or authorized the prisoner to receive money from any persons who were regular customers, and that the persons from whom he received the sums in question were of that description.

Mr. Serjt. ARABIN.—Two points have suggested themselves to my mind: one, as to whether the prosecutor ought not to select one sum received on one particular day, and confine his evidence to that; and the other, as to whether the prisoner can, under the circumstances, be considered as having received the money as the servant of the prosecutor. My own opinion is, that the evidence should be confined to one transaction, and that the receipt, as a servant, is sufficiently made out. But as the Judges are sitting in the adjoining Court, I think it advisable to confer with them on the subject.

The learned Serjeant afterwards stated that he had con-

(a) 7 & 8 Geo. 4, c. 29, ss. 47 & 48; set forth Carr. Supp. 319.

ferred with the Judges, (*Gaselee, J., Alderson, B., and Gurney, B.*), and that they were of opinion that the prosecutor must be confined to one sum and one day; and that, as the customer made the payment to the prisoner as the servant of the prosecutor, it was sufficient, to sustain the allegation, that the money was received by the prisoner for and on account of his master.

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Verdict—Guilty. Sentence, three months' imprisonment.

See the cases on the subject, collected in *Harrison's Digest*, tit. "Criminal Law," div. li.; and *Jerv. Arch. C. L.* p. 237.

CENTRAL CRIMINAL COURT.

Opening of the Court, Old Bailey, November 1, 1834.

BEFORE CHARLES FAREBROTHER, ESQ., LORD MAYOR; LORD BROUGHAM AND VAUX, LORD CHANCELLOR; TINDAL, C. J.; PARK, J.; GASELEE, J.; VAUGHAN, J.; PARKE, B.; BOLLAND, B.; BOSANQUET, J.; TAUNTON, J.; ALDERSON, B.; GURNEY, B.; WILLIAMS, J.; THE RT. HON. T. ERSKINE; SIR JOHN CROSS, KNT.; SIR JOHN NICHOLL, KNT.; SIR HERBERT JENNER, KNT.; THE HON. C. E. LAW, RECORDER; JOHN MIREHOUSE, ESQ., COMMON SERJEANT; MR. SERJEANT ARABIN, &c. &c.

THE commissions were read by *Henry Woodthorpe*, Esq., Town Clerk of London; and then

The LORD MAYOR, as chief commissioner, with the assent of the other commissioners, appointed Mr. *John*

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Clark, the Clerk of the Peace for the City of London, to fill the office of Clerk of the Central Criminal Court.

The different days, which had been appointed by their Lordships for holding the several sessions, were then stated by Mr. *Clark*, and the Commission was adjourned.

FIRST SESSION.

BEFORE LORD DENMAN, C. J., MR. JUSTICE PARK, MR. BARON BOLLAND, AND SIR JOHN CROSS, KNT. (*a*).

Nov. 7th.

REX *v.* RICHARD CARLILE.

Practice.—Where bills for misdemeanours are found under the commission of oyer and terminer at the Central Criminal Court, the defendant must give forty-eight hours' notice of bail, unless the application for process is made on a Friday, in any case in which there is reason to think that there is a desire to keep the party in custody over Sunday.

INDICTMENT for certain nuisances in Fleet Street, in the city of London (*b*).

Payne, for the prosecution, applied for a warrant to apprehend the defendant. He stated, that the application was the ordinary one, except as to the quantum of notice of bail. The bill would, previous to the establishment of the Central Criminal Court, have been found under the commission of the peace; but, according to the present arrangement, it was found under the commission of oyer and terminer (*c*).

(*a*) The grand jury were sworn on the previous Monday (the 24th), and charged by the Recorder, as the chief law officer of the city; and the Judges do not usually attend the Court till the third day of sitting, viz. the Wednesday.

(*b*) See post, p. 636.

(*c*) According to the 13th section of the act establishing the Court, no indictment for misde-

meanour, (except perjury or subornation), which might be presented at the session of the peace for Westminster, Southwark, Middlesex, Essex, Kent, or Surrey, can be presented at the Central Court, unless the party prosecuting has been bound by recognizance to go to such Court, or the accused committed or detained, or bound by recognizance

The practice had been, in cases of bills found under the commission of oyer and terminer, to require forty-eight hours' notice, and in cases under the commission of the peace only twenty-four hours. He wished the Court to lay down some rule on the subject.

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Lord DENMAN, C. J., (after conferring with the other Judges).—Forty-eight hours' notice must be given, unless the application is made on a Friday in any case in which there is reason to think that the object is to keep the party in custody over Sunday.

Application granted.

BEFORE MR. JUSTICE PARK, MR. BARON BOLLAND, AND
 SIR JOHN CROSS, KNT.

REX v. JOHN GROUT.

Nov. 28th.

THE prisoner was indicted for the manslaughter of William Monk, at the parish of West Ham, in the county of Essex, and within the jurisdiction of the Central Criminal Court, by driving the near wheel of a cart over his body.

A foot passenger was walking at lamp-light in the carriage road along a public highway, when the owner of a cart, who was proved to be near-sighted, drove along, at the rate of eight or nine miles an hour, sitting at the time on a few sacks laid on the bottom of the cart, and ran over the foot

From the evidence it appeared that the deceased, who was a tradesman, residing at West Ham, was walking near the three mile stone, on the Stratford road, about two feet from the footpath, on the 25th of October, about half-past six in the evening, when

passenger, and killed him :—Held, that he was guilty of such carelessness as amounted to the crime of manslaughter.

to appear there. This, it will be seen, does not apply to London, and therefore indictments for misdemeanours committed there may be presented at the Central Court, although there be neither recognizance nor commitment requiring appearance there.

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the prisoner, who was the owner of a cart drawn by one horse, drove along at the rate, according to the witnesses for the prosecution, of from eight to ten miles an hour, and, according to the evidence for the defence, at the rate of six or seven miles an hour, when the horse knocked down the deceased, and the near wheel went over his body, and pressed in the ribs against the lungs, and thereby caused his death. It was proved that the prisoner sat on some sacks laid on the bottom of the cart, and that he was near-sighted. It also appeared that other persons, who were walking along the same road, had with considerable difficulty got out of the way of the prisoner's cart. One of them, being called as a witness, stated, on cross-examination, that the carriage-road was smoother and better walking than the footpath (a). It was after dark, but there were gas lamps at certain distances along the line of road.

BOLLAND, B., (in summing up), told the jury (*inter alia*) that there was no doubt, on the evidence, that the life of the deceased was taken away by the act of the prisoner; and the question for their consideration would be, whether the prisoner, having the care of the cart, and being a near-sighted man, conducted himself in such a way as not to put in jeopardy the limbs and lives of his Majesty's subjects. If they thought that he had conducted himself properly, they would say he was not guilty; but, if they thought that he acted carelessly and negligently; they would pronounce him guilty of manslaughter.

Verdict—Guilty. Sentence, one month's imprisonment.

(a) No point was raised as to the right of foot passengers to use the carriage way; but upon it see the case of *Boss v. Litton*, ante, Vol. 5, p. 407, in which Lord Denman,

C. J., said, "A man has a right to walk in the road if he pleases; it is a way for foot passengers as well as carriages."

Payne, for the prosecution.

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Dowling, for the prisoner.[Attornies—*Argill & Jennings*, and *Howards*.]

REX v. JAMES OGDEN.

Nov. 29th.

THE prisoner was indicted for unlawfully transposing and removing from one piece of wrought plate to another, viz. from one gold ring to another, the lion passant, contrary to the statutes (a).

The principal evidence to affect the prisoner was his own statement at Goldsmiths' Hall, in answer to questions put to him by the prime warden of the company, and also his examination at Hatton Garden Police Office. On the whole of the facts, it appeared that the prisoner, who was a working jeweller, was employed by a regular customer, named Beeby, to make a gold ring of a particular size and weight. When it was sent home it was found to require alteration, and was sent back. Mr. Beeby, who was called as a witness for the prosecution, stated that he could not say that the ring when first sent home had not the hall mark upon it, but he was inclined to think that it had. The deputy touchwarden of the Goldsmiths' Company proved that the marks of the lion passant and the small Roman T, denoting the date, had been transferred from another ring to that in question. The prisoner's account of the transaction given on the 6th of November, when he was first taken before the magistrate, was as follows: it was not returned with the depositions, but read

A person may be found guilty under the statute 13 Geo. 3, c. 52, s. 14, and 38 Geo. 3, c. 69, s. 7, if he be proved to have transposed the mark of the Goldsmiths' Company from one gold ring to another, although both rings be genuine, and although the jury may be of opinion that he did so without any fraudulent intention.

(a) 13 Geo. 3, c. 52, s. 14, and 38 Geo. 3, c. 69, s. 7. The words used in both those statutes are "transpose or remove, or cause to be transposed or removed, from one piece of wrought plate to another, or" &c.

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in evidence by the magistrate's chief clerk from a book in which he took it down at the time:—"The ring being shewn to the prisoner, and he being asked whether he had any thing to say, his answer was—"It was sent to me to be made by Mr. Beeby, of Red Lion Street, a spoon maker. I made it and sent it home. It was returned to me to make heavier and a little smaller, and in doing so I obliterated the hall mark; and the parties sending to me that the ring must be sent home that day, I destroyed another ring, and put the hall mark of it into this ring.'" On the next day, the 7th, the prisoner was brought up again, and he then said—"The ring now produced is a genuine ring; it has been stamped at the hall; it was sent there with my work." This statement was returned with the depositions, and dated as if it had been made on the 6th.

Adolphus, in addressing the jury for the defendant, contended that the prosecution was harsh and unnecessary, as it was evident the party had no guilty intention, and had only committed an offence within the strict terms of the statute. He submitted, that the ring must be taken to be of the standard value, as, if it had not been so, it might have been proved by some chemical tests.

BOLLAND, B., (in summing up), said—By the act referred to, the Goldsmiths' Company are bound to have a certain mark, and there is no doubt that the prisoner made the ring in question, and there is no doubt also that the mark has been transposed from some other ring. The statement of the prisoner, which was read from the book, ought certainly to have been returned with the other depositions; for what is said by a prisoner is a part of the examination, and ought to be returned by the magistrate. But, notwithstanding this irregularity, I cannot say that it is not evidence. There is no proof that the ring is not genuine gold; if there had been it would be a more obvious sign of fraud than the merely saving the duty. We

must, therefore, take it that there has been no fraud on the part of the prisoner, as far as the substituting an inferior kind of metal for genuine is concerned. The question is, whether the prisoner has been guilty of transposing the hall mark of the Company from one piece of wrought plate to another.

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The prisoner received an excellent character from many witnesses, and the jury delivered their verdict in the following words:—"We find him guilty of transposing the hall mark from one genuine ring to another genuine ring, but without any fraudulent intention."

BOLLAND, B.—There are no words in the act of Parliament referring to any fraudulent intention. The words of it are—"shall transpose or remove, or cause or procure to be transposed or removed, from one piece of wrought plate to another." Unfortunately for the prisoner, I fear it can be only a verdict of guilty; but I will make a minute of it for further consideration.

The jury then found the defendant guilty, but most strongly recommended him to mercy, and the Goldsmiths' Company joined in the recommendation.

PARK, J.—The statute is express; the Court has no power to mitigate the sentence.

It was intimated that the recommendations would be forwarded to the proper quarter (a).

C. Phillips, and *Bodkin*, for the prosecution.

Adolphus, for the defendant.

[Attornies—*Lane & Co.*, and *Harner & Co.*]

(a) We understand that the prisoner has received his Majesty's pardon.

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Nov. 29th.

REX v. SAMUEL RICE.

Held, that a receipt, signed by the captain of a detachment, on the authority of which money is received from an army agent, on account of the monthly subsistence for such detachment, may be properly described as "a receipt for money," under the stat. 2 & 3 Will. 4, c. 123, s. 10, relating to forgery, although it appeared that such instruments were frequently cashed (upon indorsement) by tradesmen in the neighbourhood of the place where the regiment was stationed, and the amount afterwards received by them of the army agent.

THE indictment contained various counts, charging the prisoner with forging, and also with uttering and disposing of, knowing it to have been forged, a certain *receipt for money*, viz. a receipt for the sum of twenty pounds, with intent to defraud Henry Cox and another, and also with intent to defraud two other persons, naming them (a).

It appeared that the prisoner was second clerk of a detachment of the Royal Horse Artillery at Woolwich, and in that capacity had an opportunity of seeing the receipts for the monthly payments made by the army agents, Messrs. Cox & Greenwood; and it was proved, that, on the 26th of September, he went to the house of a tradesman in Woolwich, and obtained 20*l.*, by saying that he came from Quarter Master Serjeant Hunter for change for the instrument which he presented, and which was in the following form:—

"Received this 26th day of September, 1834, of Messrs. Cox & Co., Paymasters Royal Regiment of Artillery, the sum of 20*l.* on account of subsistence for my detachment for the present month.

"£20.

"H. Pester, Capt. Adj. R. H. A.

"Indorsed Sam. Rice, Gun. R. H. A."

It appeared that part of the instrument was engraved and part in writing; and a witness swore that he believed the written part to be in the handwriting of the prisoner. Capt. Pester proved that the signature was not written by him, nor with his authority; and a clerk from Cox & Co.'s proved that he paid the money on the presentation of the

(a) The prisoner was indicted "quittance or receipt either for under the stat. 1 Will. 4, c. 66, money or goods." s. 10, which mentions "any ac-

receipt. The prisoner deserted from the regiment on the 9th of October. It also appeared that these receipts were frequently cashed by the tradesmen in Woolwich, who afterwards received the money from the army agents.

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PARK, J.—I understand that there has been a similar indictment tried at Maidstone on the last Home Circuit, where an objection was taken, that, considering the purpose for which the instrument was used, it was rather *an order* for the payment of money than *a receipt*; and that Lord Chief Justice *Tindal*, before whom it was tried, reserved the point for the opinion of the Judges; but, having been the Judge attending Chambers during the last term, I am not aware whether the question has been considered or not (*a*). However, in the absence of information as to that case, I am of opinion that this indictment is good.

Verdict—Guilty of the uttering. Sentence
two years' imprisonment, with hard labour.

Bodkin, for the prosecution.

[Attornies for the prosecution—*Clarke & Fynmore*.]

(*a*) This was the case of *Rex v. James Hope*, which having been considered by the Judges, their Lordships were unanimously of opinion that the instrument was properly described in the indictment, and that the conviction was right.

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BEFORE MR. JUSTICE PARK, MR. BARON BOLLAND, AND
SIR JOHN CROSS, KNT.

Dec. 1st.

—
 REX v. CARLILE (a).

If a party,
having a house
in a street, ex-
hibit effigies at

his windows, and thereby attract a crowd to look at them, which causes the footway to be obstructed, so that the public cannot pass as they ought to do, this is an indictable nuisance, and it is not at all essential that the effigies should be libellous; and, *semble*, that it is not necessary to shew that the crowd consisted of idle, disorderly, and dissolute persons.

Where a defendant, indicted for a nuisance, conducted his own case, the Judge, at the conclusion of the case on the part of the prosecution, warned him that, if he called a witness, or read any letter or paper not already in evidence, or opened new facts, the counsel for the prosecution would have a right to reply.

NUISANCE.—The *first* count of the indictment stated, that the defendant, as well on the Lord's Day, commonly

(a) Mr. Carlile, who appeared to conduct his own case, had taken his seat at the table of the Court, with the counsel; but, at the sitting of the Court, Mr. Justice Park said, "Mr. Carlile, the bar have a right to those seats, and no one else can be allowed to occupy them; you, therefore, must not conduct your case in that part of the Court. In strictness a defendant who is on bail, and comes in to take his trial, ought, though not convicted, to stand in the dock where the prisoners do; but that is not usually insisted on, and there is no wish that it should be so in the present case, or that you should be put to inconvenience; and Mr. Clark (the clerk of arraigns) has been kind enough to say that he will allow you a part of his place."

The defendant left the table, and took his seat at the right hand of Mr. Clark, and there conducted the whole of his case.

In Michaelmas Term, 1834,

Mr. Hunt appeared in the Court of Exchequer, to move in person for a new trial, in the case of *Staley v. Hunt*, and had taken his seat within the bar, and he rose to address the Court from the place appropriated to King's counsel.

Lord Lyndhurst, C. B., said, "Mr. Hunt, we cannot hear you from that part of the Court. Nobody can be heard from that place but King's counsel, and those who have rank assigned them by his Majesty.

Mr. Hunt.—"Your Lordship allowed me the indulgence of being here when I conducted the trial."

Lord Lyndhurst, C. B.—"That was at *Nisi Prius*; but, in term time, even gentlemen at the bar are not allowed to take their places within the bar, unless they have rank, as I have already mentioned."

Mr. Hunt made his application from the floor of the Court.

It may be proper to observe, that the distinction "within the

called Sunday, as on other days, between the 21st of October and the taking of the inquisition, at the windows of his messuage and shop, in and near a public highway called Fleet Street, did exhibit and cause to be exhibited two scandalous and libellous effigies, representing a bishop and a tradesman, and certain inscriptions (describing them), near to the said highway, and in view of persons passing along it, with intent to attract the notice of the persons passing along the said highway, and thereby unlawfully did cause divers persons, as well men as women and children, and idle, loose, and disorderly people, wrongfully and injuriously to assemble in the said highway, looking at the said effigies, by means of which the highway was greatly obstructed, to the great damage and common nuisance, &c. The *second* count was similar, but omitted to set out the inscriptions. The *third* count was similar to the first, except that it described a third effigy, representing the devil, with the arm of the figure of the bishop placed within the arm of this figure); and in this count were set forth certain placards; and the day of the commencement of the nuisance was laid to be the 8th of November. The *fourth* count charged that the defendant exhibited "three effigies and figures," (not stating them to be libellous); within view of

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bar" does not exist at Nisi Prius. This was mentioned by Mr. Justice *Littleale*, on the Bail Court being first used as a court of Nisi Prius; and we are informed that about thirty years ago, when only three King's counsel were in the habit of attending the Court of King's Bench in London, the senior barristers occupied the front row of the seats appropriated for the bar, together with the King's counsel, precisely as they do at the assizes.

If two counsel are called to the bar on the same day at different

inns of court, the one whose name has been longest on the books of the inn of court to which he belongs is the senior; this was so settled in the instance of Mr. Abbott (afterwards Lord Tenterden), and Mr. Peake (afterwards Mr. Serjeant Peake). Both were called to the bar on the same day, the former at the Inner Temple, the latter at Lincoln's Inn; and as Mr. Abbott's name had been longer on the books of the Inner Temple than that of Mr. Peake on those of Lincoln's Inn, Mr. Abbott always acted as the senior.

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the persons passing along the highway, with intent to attract their notice, and did wrongfully cause persons to assemble and remain in the highway, looking at the effigies, by means of which the highway was obstructed. The *fifth* count was similar to the third, except that it omitted to state the whole of the inscriptions and placards. The *sixth* count charged that the defendant wilfully and unlawfully did cause divers persons wrongfully to assemble, stand, be, and remain in a certain highway, whereby the highway was obstructed (a).

(a) As the form of the indictment may be useful, we have subjoined the 3rd and 5th counts:—"And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Richard Carlile afterwards, to wit, on the 8th day of November, in the 5th year of the reign aforesaid, and on divers other days and times, as well on the Lord's Day, commonly called Sunday, as on other days, between the said 8th day of November and the day of taking this inquisition, and for divers long spaces of time, to wit, for the space of ten hours in each of the several days last aforesaid, with force and arms, at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said Court, at the windows of a certain messuage, shop, and premises. of and belonging to the said Richard Carlile, there situate and being in and near to a certain common and public highway there called Fleet Street, and to the dwelling-houses and residences of divers of the liege subjects of our said lord the King there inhabiting and residing, unlawfully did publicly exhibit and expose, and

did cause to be publicly exhibited and exposed, divers, to wit, three scandalous and libellous effigies and figures, that is to say, one effigy and figure intended to represent and representing the Devil, with a pitchfork, and one other effigy and figure intended to represent and representing a bishop of the Established Church of the said United Kingdom, the said two last-mentioned effigies and figures being placed together, and one arm of the said effigy and figure representing the bishop being placed within an arm of the said effigy and figure representing the Devil, and underneath the said two last-mentioned effigies and figures was a certain inscription and paper writing, in large letters and characters, as follows, that is to say, "Spiritual Brokers;" and one other effigy and figure, representing and intending to represent the person of a man in the ordinary dress of a tradesman, and underneath the said last-mentioned effigy and figure was a certain other inscription and paper writing, in large letters and characters, as follows, that is to say, "Temporal Broker;" and, between the said

Adolphus, for the prosecution, in his opening said—
This defendant is a bookseller in Fleet Street, and having

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two effigies and figures, in this count first mentioned, and the said effigy and figure in this count last mentioned, and near to all the effigies and figures in this count aforesaid, was a certain other inscription and paper writing, in large letters and characters, as follows, that is to say, "Props of the Church;" and also divers scandalous and libellous placards and paper writings, one of which said placards and paper writings was as follows, that is to say, "No Church Rates;" one other of which said placards and paper writings was as follows, that is to say, "Church Robberies;" one other of which said placards and paper writings was intitled as follows, that is to say, "Battle of the Church Rates;" and one other of which said placards and paper writings was intitled as follows, that is to say, "Another Seizure;" near to the said common and public highway, called Fleet Street, and to the dwelling-houses and residences aforesaid, and within view of persons passing and repassing in and along the same highway, with intent to attract the notice and attention of persons passing and repassing in and along the same highway to the effigies, figures, inscriptions, placards, and paper writings, in this count aforesaid, and thereby on the several days in that behalf aforesaid, and as well on the Lord's Day, commonly called Sunday, as on the said other days, at the parish and ward afore-

said, in London aforesaid, and within the jurisdiction of the said Court, he, the said R. Carlile, unlawfully did cause and procure and occasion divers persons, that is to say, forty persons, as well men as women and children, and idle dissolute and disorderly people, wrongfully and injuriously to assemble, stand, be, and remain, in the highway aforesaid, and near to the dwelling-houses and residences aforesaid, for divers long spaces of time, to wit, for the space of ten hours in each of the several days in that behalf aforesaid, looking at the said last-mentioned effigies and figures, and reading the said last-mentioned placards and paper writings so by him, the said Richard Carlile, exhibited and exposed in manner and with the intent aforesaid. By means of which said several premises, in this count aforesaid, the common and public highway aforesaid, on the several days and times in that behalf aforesaid, at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said Court, was greatly obstructed and straitened, so that the liege subjects of our said lord the King, during the times in this count aforesaid, could not go, return, pass, and repass in and along the said common and public highway, and to and from the said dwelling-houses and residences situate and being near to the said messuage, shop, and premises of the said Richard Carlile, so freely and con-

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been assessed to the church rate, he was summoned, and shewing no sufficient cause for non-payment, he was dis-

veniently as they had been used and accustomed to do, and of right ought to have done, and still of right ought to do, to the great damage and common nuisance of all the liege subjects of our said lord the King, in and along the said common and public highway called Fleet Street, and to and from the dwelling-houses and residences aforesaid, going, returning, passing, and repassing, and near to the aforesaid messuage, shop, and premises of the said Richard Carlile, dwelling and residing, to the evil example of all other persons in the like case offending, and against the peace of our said lord the King, his crown and dignity."

Fifth count.—"And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Richard Carlile, afterwards, to wit, on the said 8th day of November, in the year aforesaid, and on the said several other days in that behalf hereinbefore mentioned, with force and arms, at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said Court, unlawfully and injuriously did put, place, and exhibit and expose, and cause and procure to be put, placed, exhibited, and exposed divers, to wit, three other effigies and figures, that is to say, one effigy and figure intended to represent and representing the Devil with a pitchfork, one other effigy and figure intended to represent and re-

presenting a bishop of the Established Church of the said United Kingdom, and one other effigy and figure at the windows, and on the outside of a certain messuage and shop there situate and being, adjacent to a certain other common and public highway there called Fleet Street, and to the dwelling-houses and residences of divers liege subjects of our said lord the King there, and did unlawfully and injuriously keep and continue, and cause to be kept and continued, the same effigies and figures so there put, placed, exhibited, and exposed, as last aforesaid, for divers long spaces of time, to wit, for the space of ten hours in each of the several days in that behalf aforesaid, he the said Richard Carlile, at the several times he so put, placed, exhibited, and exposed the said effigies and figures in this count aforesaid, and continued the same so put, placed, exhibited, and exposed as aforesaid, well knowing that the said highway would thereby be obstructed in the manner in this count hereinafter mentioned; and that the said Richard Carlile, on the several days in that behalf aforesaid, and for divers long spaces of time, to wit, for the space of ten hours in each of the said several days, and as well on the Lord's Day, commonly called Sunday, as on the said other days, at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said Court, by means of the putting, placing,

trained on. After this he took out the frames of his first floor windows, and put in one of the windows an effigy of a bishop of the established church, under which was written "Spiritual Broker," and in the other window a figure of a man in ordinary dress, and under him the words "Temporal Broker;" and these figures were there on Sundays as well as during the rest of the week. These figures attracted crowds of persons to gaze at them, and the consequence was, that the trade of the neighbouring shops was much injured, and the footpaths were so obstructed that persons were obliged to walk in the carriage way. The defendant afterwards added a third figure, that of the devil, the arm of the figure of the bishop being tucked into that of the devil. There can be no doubt that every man has a right to use his own premises, and do any thing he pleases there which the law does not forbid, so that he does no injury to his neighbours; but if a man does any thing on his premises in view of the public, and crowds of persons are attracted by it to the injury of his neighbours, that thing he cannot be allowed to do. If

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exhibiting, and exposing the said last-mentioned effigies and figures, and keeping and continuing the same so put, placed, exhibited, and exposed at the windows, and the outside of the said messuage and shop, as in this count aforesaid, wilfully, unlawfully, and injuriously did cause, and procure, and occasion divers persons, as well men as women and children, and idle, dissolute, and disorderly people, that is to say, forty persons, to assemble, stand, and be, and remain in the said last-mentioned highway, whereby the same highway, on the several days and times in that behalf aforesaid, and as well on the Lord's Days, commonly called Sundays, as on other days,

was greatly obstructed and straitened, so that the liege subjects of our said lord the King, during the said times, could not go, return, pass, and repass in and along the same highway, so freely and conveniently as they had been used and accustomed to do, and of right ought to have done, and still of right ought to do, to the great damage and common nuisance of all the liege subjects of our said lord the King, in and along the same highway, going, returning, passing, and repassing, and there inhabiting and residing, and against the peace of our said lord the King, his crown and dignity."

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the defendant had shewn these figures to persons in his private parlour he would not be liable, at least on this form of indictment, the complaint here being the nuisance to the public. On this indictment I do not put the case at all on the circumstance of one of the figures being that of a bishop; I put it on the ground that the defendant has not a right to place effigies so as to attract crowds to the injury of his Majesty's subjects.

To shew that the defendant was the occupier of the house at which the effigies were exhibited, the collectors of taxes and of rates were called to prove that the defendant was the person who paid the rates and taxes.

To prove the nuisance, several witnesses were called; and it was stated by one of them, who was in the City police, that the two first-mentioned effigies were put up on the 21st of October, and that the third figure was added on Sunday the 9th of November, the whole three being up on the morning of the trial. This witness stated that the people looking at these effigies caused a crowd on the pavement on both sides of the street; and that passengers, particularly old persons and females, were obliged thereby to go off the footpath and into the carriage way, as there was not room for them to walk on the foot pavement; and that during the continuance of the alleged nuisance three persons had been taken into custody at that part of the street, one for picking pockets, and two for attempting to commit that offence. In his cross-examination this witness said, that, in consequence of the crowd on the pavement, the people shoved one another about; and he also said, that he had seen caricature shops which were surrounded by people, but not to so great an extent as the present alleged nuisance; that he had been in Smithfield on a market day; and that he had seen the crowd at the Lord Mayor's show.

PARK, J.—One nuisance does not justify another; and if every shop in London were guilty of a nuisance, that will

not justify you. I not only say this of myself, but the learned persons who sit beside me agree with me.

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Another witness, named Harris, also deposed to the inconvenience to passengers going along the street, and to the neighbouring shops, which was occasioned by the crowd which was daily attracted by the effigies; and he also stated, that the crowd consisted of "the lowest of the low;" and that the cash receipts of his shop had been reduced 3*l*. per day during the time the effigies had been exhibited, and, as he believed, in consequence of their exhibition.

It was further proved by Mr. Gray, who keeps the booking-office at the Bolt-in-Tun, Fleet Street, that he had counted at different times from fifteen to fifty persons standing on the opposite side of the street to look at the effigies, and from ten to thirty on his side of it. In his cross-examination he said, that he put placards in his windows to attract observation. And it was further proved by Mr. Chandler, the proprietor of the Portugal Hotel, which was opposite the defendant's house, that the crowd was such as to prevent customers coming into his house, unless the police cleared the way for them; and that the crowd continually standing over his area gratings obliged his servants to burn candles every day and all day in his kitchen.

Adolphus, at the conclusion of the case, on the part of the prosecution, informed the defendant that he should claim a right to reply, if the latter called witnesses, or read any papers not already in evidence.

PARK, J.—I had a similar case at Warwick, where a person defended himself. I gave him warning, that, if he called a witness, or read any letter or paper not already in evidence, or opened new facts which were not proved, the counsel on the other side would have a right to reply.

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The defendant addressed the jury.—The circumstance of persons being obliged to go out into the carriage way is a matter of necessity, and it occurs every day; and, with respect to the attracting of a crowd, his Majesty never goes to the theatre, or to open the Parliament, without a much greater crowd than ever were at my shop. It is only a public nuisance, for which a party is indictable; and if our neighbours are injured in their trade, that would be the subject of an action; and, with respect to the crowd being an injury to the trade of the shops, my own is injured by it as much as my neighbours. Mr. Justice Blackstone (*a*) defines a public nuisance to be “such inconvenient or troublesome offences as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable, as it would be unreasonable to multiply suits by giving every man a separate right of action for what dam-nifies him in common only with the rest of his fellow sub-jects.” It is charged, that the persons assembled to view my figures were dissolute, idle, and disorderly persons. So far from that, it is quite evident that the persons were the ordinary passengers of the street, who stopped in their way to look at these figures. There is no prece-dent for punishing a man for attracting persons to his shop, and care should be taken not to make one. A number of persons being attracted to a particular shop may cause no doubt some inconveniencè to passengers along the street; but why do we pay for situations, and disburse large sums of money annually in high rents in Fleet Street, if it is not to have the opportunity of putting things in our windows to attract the attention of the customers. I might just as fairly indict Mr. Gray for causing an obstruction by means of his coach-office. There used to be two effi-gies at St. Dunstan’s Church, which struck the quarters of an hour. They attracted a crowd every quarter of an

(*a*) 4 Bl. Com. c. 13.

hour throughout the day, and yet I am indicted for causing seventy persons to look at my effigies. I would ask, why ought the Lord Mayor not to be indicted for the crowd that he attracts on the 9th of November every year? and if Bartholomew Fair is allowed in September, I ought not to be indicted for exhibiting effigies in October; and, so far from there being any thing necessarily improper in effigies, the figures of Gog and Magog used to be carried in the civic procession. It is said that the effigies exhibited by me are libellous. They are fair figures, and as good as I could have made: one of them is a fair representation of a bishop; and they were meant to denote that the church, which is represented by the bishop, is not supported voluntarily, but by the law, which is represented by the broker (*a*). Illuminations attract a crowd; so do military movements; so do the learned Judges when they go in state to St. Paul's, and even the people coming from the churches on a Sunday morning sometimes are so numerous as to oblige persons to walk in the carriage way. A few years ago, a person named Tregear was tried for a nuisance. He kept a caricature shop in Cheapside, at the corner of Wood Street; and he, by placing caricatures in the windows of his shop, caused an obstruction in the footway by the people standing to look at them; he was convicted at the London Sessions, but the Recorder afterwards considered that it was not an indictable offence, and no sentence was ever passed on the defendant.

C. Phillips, amicus Curiae.—I think Mr. Carlile is in some error as to that case. The defendant was convicted, but he was never brought up for judgment, as he undertook to abate the nuisance.

R. Gurney.—I consented, on the part of the prosecution, to the respite of his recognizance.

(*a*) Mr. Carlile did not, throughout his defence, make any remark or observation on the figure of the Devil.

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The defendant.—In that case, the learned counsel for Mr. Tregear said, that, if his client was indicted for putting prints in his window, the beautiful daughter of Mr. Very might equally have been charged to be an indictable nuisance (*a*). If the effigies were libellous, they might be indictable. No particular bishop is denoted, and no particular broker designated. (The defendant entered into a statement of considerable length to shew that one of his servants had been improperly fined 5*l*. for a supposed offence against the London Paving Act, 4 Geo. 4, cap. xciv, and also read all the placards stated in the indictment).

To shew the circumstances relating to the conviction of the defendant's servant, Mr. Alderman Brown and Sir John Key, Bart., were examined (*b*); and to speak to an interview between the defendant and Mr. Alderman Farebrother, the latter was examined (*b*); who also stated, in answer to a question put by the defendant—whether the persons assembled were idle and disorderly? that he never saw such a set of fellows in his life, both for behaviour and conversation. The defendant also called two witnesses with a view of shewing that the obstruction in the street was very trifling; and one of them said, that there was no greater crowd looking in at the defendant's shop than at that of Mr. Waller, the stationer and printseller, a little more to the west.

PARK, J.—If Mr. Waller makes a nuisance he may be indicted.

(*a*) Mr. Very was a confectioner in Regent Street, and he had a daughter who attended to his shop, who was considered so beautiful that a crowd of three or four hundred persons used daily to assemble and stand at his shop windows for the purpose of looking at her. Police officers were obliged to be in constant attendance before Mr.

Very's house, and the inconvenience was so great, both to Mr. Very and to his neighbours, that he was obliged to send his daughter out of town.

(*b*) Mr. Adolphus several times said, that the defendant was going into irrelevant matter, but that he should decline taking any objection.

Adolphus, in reply.—In the case of *Rex v. Russell* (a), it was held, that a carrier delivering his goods must do it in such a way as not to cause a nuisance. So, in another case (b), it was decided that I may shoot pigeons in my own private ground; but if persons are attracted by the shooting, and come on the outside to shoot the stray pigeons which escape from me, and that is a nuisance, I am indictable for it. So I may, if I choose, ride on horseback to the Land's End with my face to the horse's tail; but if I draw a crowd and make a nuisance by riding a skimmington, I am clearly indictable for it. The publication of a libel to occasion a crowd is wholly unlike all the cases put by the defendant. The seller of caricatures was convicted, though he exhibited his prints in the exercise of his trade. If Mr. Carlile dealt in effigies, and then put up one exhibited for sale, there might be some similarity between the cases, and compassion would follow if he had acted in error; but no compassion can be expected where a party has done a thing merely for revenge.

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PARK, J., (in summing up).—The gravamen of a charge like this is not whether those effigies were libellous, but whether the defendant, by the exhibition of them at his windows, caused the footway of Fleet Street to be obstructed, so that the public could not pass as they ought to do; and the main question is, whether his Majesty's subjects have been annoyed in this respect. There are in substance two charges against the defendant; one for putting up the first two effigies, and the other for having on the 9th of November added the figure of the Devil, with the arm of the figure of the bishop put through the arm of this figure. It is not necessary that it should be proved that this was a scandalous libel; but if it were, it would be for you to say whether it was not a scandalous libel to represent a bishop

(a) 6 East, 427.

(b) *Rex v. Moore*, 3 B. & Ad. 184.

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of the church of England leaning upon a devil. The defendant says, that, if his neighbour be injured, he ought to bring his action. No doubt, if a man does an act which injures a particular neighbour he is not liable to be indicted if no one else but that neighbour be injured; but if a place is situate near a highway, and the defendant do that which causes the persons passing to be prevented from passing as they ought to do, and, besides this, people are annoyed in the occupation of their houses, this is a nuisance, for which the party is indictable. It may be said, that Mr. Gray, the coach proprietor, takes up passengers at his coach-office; but if he does, he must do it in a reasonable time; and Lord *Ellenborough* draws this very distinction, for he says, in the case of *Rex v. Cross* (a), a stage-coach may set down and take up passengers in the street, this being necessary for public convenience, but it must be done in a reasonable time. And in another case (b), Lord *Ellenborough* said, "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance; a cart or waggon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance." There is no doubt that a tradesman may expose his wares for sale; but he must do it in such a way as not by so doing to cause obstruction in the public streets. In the case of *Rex v. Russell*, the party was merely exercising his lawful trade, and he used to let packages stand on the footpath. He was held indictable; but if he had merely carried his packages out he would not have been liable to have been prosecuted. In the case of *Rex v.*

(a) 3 Camp. 224.

(b) *Rex v. Jones*, 3 Camp. 230.

Cross, Lord *Ellenborough* uses the words " unauthorized obstruction." Were not these figures unauthorized? In the course of his defence the defendant has mentioned a case of a printseller named Tregear, who was found guilty of a nuisance; and he stated that no sentence was passed, as the learned Recorder was dissatisfied, and thought it an improper conviction. In the latter part of the statement the defendant has been completely misinformed. It is totally unfounded. I have seen the learned Recorder, and he desired that I would relieve him from the imputation of the bad law that is ascribed to him. He says, that he never had any doubt about the law of the case, or the perfect propriety of the conviction; but that, as the defendant submitted and abated the nuisance, no sentence was passed. In the present case, one question is, whether this act of the defendant was at all necessary for the *bond fide* carrying on of his trade; for if it was, and he did not take up more time in the doing of it than was necessary, the law would do what it could to protect him. Now the defendant is so far from thinking that this exhibition is essential to the carrying on of his trade, that he has told us to-day, that he considers his trade to be injured by it. The defendant has compared this exhibition to the procession of the Judges going to St. Paul's; however, in that case, the crowd who look at the procession move on with it, and do not stand obstructing the street, as they have done in this case. The defendant has also observed upon the Lord Mayor's Day; however, that is but one day in the year; and if, instead of that, the Lord Mayor's Day lasted from October to December, I should say it ought to be put a stop to. The defendant has also said that Bartholomew Fair is a nuisance, and from what I have heard of it, I very much suspect that it is so. The defendant has also said a great deal about the persons assembled not being idle, disorderly, and dissolute; I am not prepared to say that it was necessary to shew that they were disorderly per-

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sons; but Mr. Alderman Farebrother, who was called as a witness for the defendant, has told us, that he never saw such a set of fellows in his life, both for behaviour and conversation. The defendant has asked whether he has not a right to do what he will on his own premises? No doubt he has, but he must not do any thing there that injures his neighbours, so as to be a private nuisance; nor any thing which annoys the public, which is a public nuisance. The defendant has published placards (which have been read) complaining of a grievance inflicted on him respecting the church rate. He may do so, and so a man may publish a true and *bond fide* account of a trial. But if he puts a libellous heading to his account of the trial, such as "most infamous transaction," that vitiates the whole. Now here the defendant has headed one of his placards in large letters "battle of the church rates," and another, in letters larger still, "church robbery." However, in this indictment the whole object of describing the figures, inscriptions, and placards is to shew what it was that the defendant did to cause the obstruction of the highway. If this be a nuisance, the defendant ought to be convicted; and if there were 500 other nuisances, they will not justify this. The question therefore really is, whether you think the defendant has by the acts proved caused an obstruction of the public highway to the nuisance of persons passing along that way, and to the persons residing in that neighbourhood.

Verdict—Guilty.

Adolphus, Bullock, and R. Gurney, for the prosecution.

The defendant in person.

[Attorney for the prosecution—*R. F. Newman*.]

Judgment was postponed by consent till the next Ses-

sion, the defendant giving bail for his appearance; and at that session it being admitted that the three figures and all the placards were taken down on the evening of the trial, and not since put up, the Court sentenced the defendant to pay a fine of 40*s.*, and to find sureties for his good behaviour for three years, himself in 200*l.*, and two sureties in 50*l.* each, and to be imprisoned till such fine was paid and such sureties given.

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SECOND SESSION.

BEFORE LORD CHIEF JUSTICE TINDAL, MR. JUSTICE LITTLEDALE, AND THE HON. C. E. LAW, RECORDER.

REX v. CARLTON.

Dec. 17th.

THE defendant had been indicted for a conspiracy in the county of Middlesex at the last Session of this Court; but, after the grand jury had brought in the indictment, the clerk of the Court had struck out the words "a true bill," on the ground of the want of jurisdiction, as the prosecutor had not been bound over to prefer his bill at this Court, as required by the 13th section of the act (a).

The binding over to prosecute, which is necessary to give the *grand jury* of the Central Criminal Court jurisdiction in certain cases of misdemeanour, under the 13th section of the act 4 & 5 Will. 4, c. 36, must take place before a magistrate, &c. previous to the session of that Court, and cannot be done by the Court itself.

Adolphus, on the part of the prosecution, now applied to the Court to allow the prosecutor to be bound over in Court to prosecute, so that another bill might be presented to the grand jury, which was sitting, in order that the trial might take place at the present Session.

TINDAL, C. J.—I think this cannot be done; the bind-

(a) Mentioned ante, p. 628, note (c).

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ing by recognizance, mentioned in the 13th section of the statute, evidently refers to an act to be done previously to the Session at which the misdemeanour is to be tried. The common-law power of the grand jury to find a bill at the Quarter Sessions is not taken away by the 17th section (*a*), and continues, unless the prosecutor has been bound to appear at this Court. They may inquire, although they cannot try. It is to be regretted that this is so, inasmuch as it makes it necessary to take another step, viz. to remove the indictment by *certiorari* to this Court. This is a circuitous course, but it cannot be helped; perhaps it was an omission upon the part of those who framed the act.

Application refused.

(*a*) That section enacts, that the justices of the peace shall not, at the General or Quarter Sessions, try any person charged with certain specified offences.

THIRD SESSION.

BEFORE LORD CHIEF BARON SCARLETT (*a*), MR. JUSTICE BOSANQUET, AND MR. JUSTICE TAUNTON.

REX v. PALMER.

Jun. 7th.

The presentment of a bill for a capital offence may be postponed on affidavit of the attorney for the

prosecution stating the illness of a material and necessary witness, although such witness have been examined before a magistrate, and his deposition do not disclose matter of sufficient importance to shew that his evidence was necessary, as the important facts may have been discovered since.

THE prisoner was committed on several charges of arson, in one on which the parish officers of St. Mary, Rotherhithe, had been bound over to prosecute.

(*a*) His Lordship was, a few days afterwards, made Lord Abinger, see Promotions, post.

Clarkson, on the part of the parish, moved to postpone the cases till the next Session, on an affidavit by the attorney for the prosecution of the illness of the party whose premises had been burnt, and who the attorney swore was a material and necessary witness.

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Chambers, on the part of the prisoner, opposed the application, on the ground, that, in the depositions which had been returned, he understood that no material evidence could be given by that party; and he requested that the Court would examine the deposition to ascertain that fact.

Clarkson replied, that the deposition taken before the magistrate would not form a correct criterion, as the material evidence might have been and in fact was discovered since, although that fact did not appear in the affidavit.

The Court declined to read the deposition, and, after consulting together—

Granted the application.

BEFORE MR. JUSTICE BOSANQUET, AND MR. JUSTICE TAUNTON.

REX v. WATSON and Another.

BURGLARY.—There was not any counsel for the prosecution.

TAUNTON, J., who tried the case, after the examination of witnesses to fact on the part of the prisoners, called back a witness for the prosecution, and asked him several questions; and then, addressing the prisoner's counsel, inquired if he had any question to ask upon it, saying that,

Jan. 8th.

Where, after the examination of witnesses to fact on behalf of a prisoner, the Judge (there being no counsel for the prosecution) calls back and examines a witness for the prosecution, the prisoner's counsel has

a right to cross-examine again, if he thinks it material.

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although he, as Judge, had called back the witness for the purposes of justice, he thought it right that the prisoners' counsel should have the opportunity of cross-examining the witness again.

Doane, for the prisoners.

REX v. PALMER (a).

The Judges at the Central Court, after postponement till the next session, on motion for the prosecution, of the presentation of a bill for a capital offence, refused, on motion for the prisoner, to read over very long depositions, to enable them to decide whether they would admit him to bail: although the application was made on the ground that there was not sufficient time to prepare proper affidavits before the breaking up of the Court.

CHAMBERS, for the prisoner, applied to their Lordships to read over the depositions returned by the magistrates (which he admitted were very voluminous, the examination having occupied five or six days), and, if they thought it a fit case, to admit the prisoner to bail without the production of any affidavits on his part, inasmuch as affidavits, it was feared, could not be produced before the breaking up of the Court; and he stated, also, that he had this further object in view, viz. that if their Lordships, on looking over the depositions, should not think it right to admit the prisoner to bail, he might not be prejudiced in applying to the Court of King's Bench for that purpose, by being told that he had neglected to apply in the proper quarter.

Clarkson, for the prosecution, objected to the application as altogether unprecedented; but stated that the parish would not throw any technical difficulties in the way of an application to the Court of King's Bench.

Their Lordships conferred together, and—

BOSANQUET, J., said—I am of opinion that the application ought not to be granted; but the object which the learned counsel has in view with reference to the Court of King's Bench will be answered by his having mentioned the matter to us.

(a) See ante, p. 652.

TAUNTON, J.—I have never known such an application made before; and I think we ought not to be required to read over depositions which are admitted to be of great length, particularly when no parts of them have been pointed out as shewing that the evidence is slight against the prisoner.

Application refused.

Clarkson, for the prosecution.

Chambers, for the prisoner.

[Attornies—*Curling*, and *Warner*.]

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REX v. JOHN GREEN and CAROLINE ALLEN.

Jan. 19th.

THE prisoners were both indicted as principals for breaking and entering the dwelling-house of a person named Vallance, at West Ham, in the county of Essex, and stealing therein a watch and other articles of the value of 20*l*.

It appeared that the two prisoners had been seen together on the road before they arrived at the house in question, which was that of a surgeon, having a shop open to the street, and a surgery behind the shop, from which the articles stolen were taken. The female prisoner waited in the street a few yards on while the male prisoner went into the shop. Shortly after he came out and handed a basket to the female prisoner; and, seeing a woman coming out of the house as in pursuit, immediately ran off over marshes and through ditches, but was at length taken and brought handcuffed by a constable into the shop of the prosecutor. While he was there, it appeared that some recommendations to confess had been, in the absence of the prosecutor, made to him by the person who had been left in charge of the house; and the prisoner said, that, if

A prisoner charged with felony being in custody handcuffed in the house of the prosecutor, after a conversation with the prosecutor and another person, in which he was told that they would do all they could for him, said—"If the handcuffs are taken off I will tell you where I put the property:"—*Scinde*, that this statement was receivable in evidence, and could not be objected to, either as a confession made under a promise, or a statement obtained by duress.

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the handcuffs were taken off, he would tell where he put the property. He had expressed doubts whether, if he told where the property was, he could rely on being leniently dealt with, and, after the prosecutor came in, he was told that they would do all they could for him.

Chambers, for the prisoner John Green, objected, that the statement made by him was not receivable in evidence as it was made under duress, and to deliver himself from the state of confinement in which he was. The prisoner's saying—"If the handcuffs are taken off I will tell you where I put the property," is the same as if a party being in prison said—"If you will let me out of prison I will tell you something." The shop of the prosecutor was for the time the prison of the prisoner.

BOSANQUET, J.—I do not think there is any thing in the objection, but I will take a note of it.

TAUNTON, J.—I take it no man ever makes a confession voluntarily, without proposing to himself in his own mind some advantage to be derived from it.

The evidence was received, and it appeared that the prisoner had led the parties about to various ditches, where he pretended that he had thrown the watch; but, after a very long search, and the draining of the ditches, it was not found.

The only evidence against the female prisoner was, that, after she had been waiting for the male prisoner, when he came out he gave her a basket to hold, which basket was proved to belong to the prosecutor: she was, however, taken into custody almost immediately; but it appeared that she had an opportunity for a few minutes of running away, but did not avail herself of it.

BOSANQUET, J., (in summing up), told the jury, that

what the prisoner, John Green, had said did not amount to a confession; but he thought it would be better that they should lay out of their consideration all the conversation with him, and decide the case upon the facts alone. He then told the jury, that, if the two prisoners *were acting in concert*, they might both be found guilty, although only one of them took the property.

Verdict—John Green guilty, and Caroline Allen not guilty.

Chambers, for the prisoner Green.

Payne, for the prisoner Allen.

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BEFORE THE HON. C. E. LAW, RECORDER.

REX v. WALKER.

Jan. 9th.

THE prisoner was charged with obtaining goods under *false* pretences.

The indictment stated that the prisoner "unlawfully, knowingly, and designedly did *feloniously* pretend," &c.

The RECORDER thought that the indictment was bad; and, after consulting the Judges (Mr. Justice *Bosanquet* and Mr. Justice *Taunton*), who were sitting in the adjoining Court, stated that their Lordships were of the same opinion.

The prisoner was therefore acquitted.

An indictment on a charge of obtaining goods under *false* pretences is bad, if it states that the prisoner "unlawfully, knowingly, and designedly, did *feloniously* pretend," &c.

COURT OF KING'S BENCH.

*First Sitzings at Westminster, in Michaelmas Term,
1834.*

BEFORE MR. JUSTICE LITLEDALF.

1834.

Nov. 4th.

BIRCH, Administrator of VINCENT, *v.* DAWSON, Executor
of DAWSON.

A testator, by his will, devised his house, with the grates, stoves, coppers, &c., and the "fixtures and fixed furniture," to his executors, upon trust to permit E. S. V. to have the use thereof for her life; and he also bequeathed his furniture, plate, &c. to E. S. V. absolutely:—
Held, that chimney-glasses fixed to the wall, and a bookcase screwed or fastened to the wall, are fixed furniture; but that a bookcase merely placed in a recess, and not screwed or fastened to the wall, is not so.
Whether a carpet tacked to the floor is fixed furniture, *quære?*

DETINUE for four chimney-glasses and a bookcase.

It was opened by Sir *J. Scarlett*, for the plaintiff, that the defendant was the executor of Mr. George Dawson, who, by his will, dated the 24th day of May, 1831, bequeathed his furniture to Miss Vincent, the plaintiff's intestate, bequeathing to her also the use of his house, fixtures, and fixed furniture. Miss Vincent survived the testator, and occupied the house as long as she lived; but, at her death, the defendant, who took possession of the house, refused to give up the articles in question, and also a carpet, which had been tacked to the floor, alleging that they were included in the term "fixed furniture." The clause of the will was as follows:—

"And I give and bequeath unto my son, George Pel-sant Dawson, and Frederick Bossy, my leasehold mes-suage or tenement, being No. 24, Brompton Square, in the said county of Middlesex, with the grates, stoves, coppers, locks, bolts, keys, and bells, and other fixtures and fixed furniture therein, and also the household goods, furniture, plate, linen, books, china, wine, and liquors therein, at the time of my decease, upon the trusts herein-after declared of and concerning the said leasehold mes-

suage, fixtures, and fixed furniture, upon trust to permit Eliz. Susan Vincent to have the use and enjoyment thereof during her life.

“ And as to the said household goods, furniture, plate, linen, china, books, wines, and liquors, and other properties in that messuage, not being comprehended under the preceding term, fixtures and fixed furniture, in trust for the said E. S. V. absolutely, as her own property.”

Since the first refusal the defendant had given up the carpet; but contended that the looking-glasses (which were chimney-glasses) and the bookcase were fixed furniture.

LITTLEDALE, J.—If these are not fixed furniture, what is? I should not think that putting tacks in a carpet would make it fixed furniture, because carpets, though tacked, are often taken up and put down again. If the looking-glasses are fixed to the wall, I think they are fixed furniture. With respect to the bookcase, if it merely stands in a recess, and is not screwed or fastened to the wall, I think that is not so.

Sir J. Scarlett.—In the case of *Beck v. Rebaut* (a) it had been covenanted by Alderman Chamberlain that he would settle upon the plaintiff, who had married his daughter, his house, all the pictures on the staircase, and over the doors and chimney-pieces, and *all* things fixed to the freehold. The alderman died, and directed by his will that the defendant, his executor and devisee in trust, should carry this into execution. The defendant took away the pier-glasses, the chimney-glasses, and hangings; and the Lord Keeper held that hangings and looking-glasses were only matter of ornament and furniture, and not to be taken as part of the house or freehold.

(a) 1 P. Wms. 94.

1834.

BIRCH
v.
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LITLEDALE, J.—These articles are furniture no doubt; but the words here are fixed furniture.

Sir *J. Scarlett*.—If a man has in his wall an iron female screw, and he puts through a bookcase a male screw, so as to screw the book-case to the wall, would that be fixed furniture?

LITLEDALE, J.—I think so.

Sir *J. Scarlett*.—Some ladies have their drawing-room chairs screwed to the floor.

LITLEDALE, J.—Then I think they would be fixed furniture. A nailed-down carpet I have some doubt about. That is my opinion, and I shall therefore nonsuit the plaintiff.

Nonsuit, with leave to move to enter a verdict for the plaintiff for nominal damages, the defendant undertaking to give up the articles if the Court should order a verdict to be entered for the plaintiff.

Sir *J. Scarlett*, and *G. T. White*, for the plaintiff.

F. Pollock, and *W. H. Watson*, for the defendant.

[Attornies—*Binns*, and *Taylor*.]

ON a subsequent day, *G. T. White* applied to the Court in pursuance of the leave given, but the Court refused a rule.

1834.

Second Sittings at Westminster, in Michaelmas Term, 1834.

BEFORE MR. JUSTICE LITTLEDALE.

WATKINS *v.* MORGAN.

Nov. 22nd.

DEBT.—The declaration (dated July 30, 1834) stated, that, on the 15th of June, 1832, by indenture under seal, the defendant covenanted to pay the plaintiff the sum of £70*l.*, with lawful interest for the same, on the 15th day of December then next following, but that he did not do so, but wholly failed, and made default; and that, in consequence, there was due and owing from the defendant to the plaintiff, on account of the said sum of £70*l.* and interest, the sum of 300*l.*, for which he brought his action. It concluded to the plaintiff's damage of 10*l.* Plea—Non est factum.

A. covenanted to pay B. 270*l.* on the 15th of December, with interest up to that time. He did not do so, and B. brought an action of debt, laying his damages at 10*l.*—Held, that B. could not recover any more than the principal, the interest up to the 15th of December, and 10*l.* more, although the interest up to the time of the action amounted to a larger sum; and the Judge at the trial would not order the declaration to be amended by inserting a larger sum than 10*l.* as the damages.

R. V. Richards, for the plaintiff, was stating to the jury that he sought to recover the sum of 300*l.*, being for the principal sum and interest up to the time when the action was commenced.

LITTLEDALE, J., said, that he could not allow the verdict to be taken for that sum, inasmuch as the contract in the deed was only to pay 270*l.*, with six months' interest, which would be 276*l.* 15*s.*, and all the rest was damages for the detention; and the plaintiff, having only laid those damages at the sum of 10*l.*, could not recover more.

R. V. Richards asked his Lordship to allow the declaration to be amended.

LITTLEDALE, J.—I do not see how I can amend the statement of the damage. It is not any variance between the deed and the setting out of it in the declaration.

1834.

WATKINS
v.
MORGAN.

R. V. Richards suggested that his Lordship might allow the verdict to be taken for the whole sum claimed, and that he might afterwards apply to amend the record by the verdict.

LITTLEDALE, J., repeated that he could not allow the verdict to be taken for any larger sum than he had first mentioned ; and it was accordingly taken for

276*l.* 15*s.* debt, and 10*l.* damages.

R. V. Richards, for the plaintiff.

The cause was undefended.

[Attornies—*W. Jones*, and ———.]

Adjourned Sittings at Westminster, after Michaelmas Term, 1834.

BEFORE LORD DENMAN, C. J.

Dec. 5th.

ROFFEY v. SMITH.

If there has been a contract for a sale of goods at a specific price, and a subsequent delivery of the goods, the defendant cannot set up as a defence that the goods were of so bad a quality as to be useless, unless he has pleaded it specially.

The rules of pleading of H. T. 4 Will. 4, are part and parcel of the law of the land.

ASSUMPSIT for goods sold, with the money counts.
Plea—Non-assumpsit.

It was admitted that the defendant had ordered of the plaintiff a quantity of household flour, part of it at 38*s.* and the residue at 39*s.* per sack; and it was proved that all the flour had been delivered to the defendant. Three of the sacks of flour had been paid for by the defendant, and therefore formed no part of the plaintiff's particulars of demand.

Sir *J. Scarlett*, for the defendant, opened that he should prove that all the flour, except the three sacks of it already paid for, was so bad as to be unused and unusable; and that, by the usage of the flour trade, bad flour was always taken back by the vendor.

Platt, for the plaintiff, referred to rule 5 of H. T. 4 Will. 4 (a), and submitted that the defendant could not go into this defence, as he had not pleaded it specially.

Sir *J. Scarlett*.—If a person cannot be allowed to say that the goods were so bad as to be useless, unless he has pleaded a special plea, I own that I cannot go into my defence.

Justice, for the defendant.—The plea is, that the defendant did not undertake and promise to pay. He certainly never promised or intended to promise to pay for these goods.

Sir *J. Scarlett*.—The question is, what is meant by the words “confession and avoidance,” which are used in the rule. I should think that those words meant a confession of the contract, and a setting up of some matter of subsequent avoidance.

Lord DENMAN, C. J.—I am of opinion, that, if there is

(a) By which (*inter alia*) it is ordered, that, “in an action of *indebitatus assumpsit* for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact.” “In every species of *assumpsit* all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable, in point of law, on the ground of

fraud or otherwise, shall be specially pleaded.—*Ex. gr.* Infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.”

1834.

ROFFEY
v.
SMITH.

1894.

ROFFEY
v.
SMITH.

a contract for a sale at a specific time, and a subsequent delivery of the goods, and the defendant means to say that he is not liable to pay because the goods were bad, he must plead it specially.

Platt.—As these rules were not repudiated by Parliament, every one is bound to know them, and they are the law of the land.

LORD DENMAN, C.J.—They are: and very beneficial law. This is a line of defence which the plaintiff ought to have had notice of by the pleas. There must be a verdict for the plaintiff.

Verdict for the plaintiff—Damages 38*l*.

Platt, and *Steer*, for the plaintiff.

Sir *J. Scarlett*, and *Justice*, for the defendant.

[Attornies—*J. Butt*, and *C. Ford*.]

Dec. 5th.

HARDING v. COBLEY.

In an action for damage done to the plaintiff's horse and cart, by the negligent driving of the defendant's servant, the plaintiff's servant, who was driving his cart at the time of the accident, is not a competent witness for the plaintiff without a release, and the stat. 3 & 4 Will. 4, c. 42, s. 26, has made no alteration in the law on this point.

CASE, for an injury done to the plaintiff's horse and cart, by the negligent driving of the defendant's servant.

It was opened, on the part of the plaintiff, that his carter was driving an errand cart from London to Blackwall, along the granite tramway in the Commercial Road, and that the defendant's servant came up in a contrary direction, driving a light spring cart, which, by his improper driving, came in collision with the plaintiff's cart, and caused the injury.

On the part of the plaintiff, the carter, who drove the plaintiff's cart, was called.

Platt, for the defendant, objected that he was not a competent witness without a release.

Lord DENMAN, C. J.—That was decided to be so in the case of *Wake v. Lock* (a), which I considered a good deal.

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HARDING
v.
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F. Pollock, for the plaintiff.—That was a case before the stat. 3 & 4 Will. 4, c. 42, s. 26 (b).

Lord DENMAN, C. J.—I do not see how that statute can be applied. That renders competent those persons for or against whom the verdict or judgment would be evidence. Now, if this witness says what he is expected to say, and is believed, there never can be any action against him. I do not think that the act of Parliament you have cited has at all altered the law on this point (c).

The release was given, and the witness examined.

The defence was, that the plaintiff's cart was on the wrong side of the road.

Verdict for the defendant.

F. Pollock, and *Talbot*, for the plaintiff.

Platt, and *Ryland*, for the defendant.

[Attornies—*Wm. Smith*, and *Ashfield*.]

(a) Ante, Vol. 5, p. 454.

(b) Set forth ante, p. 283, n. (a).

(c) See the cases of *Mitchell*

v. *Hunt*, ante, p. 351; *Harring-*

ton v. Caswall, ante, p. 352; and

Heming v. English, ante, p. 542.

1834.

Dec. 13th.

WARNER v. HAINES.

In an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded—*first*, that the bill was accepted for a debt from which he was discharged under the Insolvent Debtors' Act, of which the plaintiff at the time of the indorsement had notice; and, *second*, that the bill was accepted to induce the drawer not to oppose the discharge of the defendant under that act, of which at the time of the indorsement the plaintiff also had notice. The plaintiff in his replication denied the notice stated in each of the pleas:—Held, that on these issues the defendant must begin, and that the onus of proving that the plaintiff had notice was on the defendant.

ASSUMPSIT by the plaintiff, as indorsee, against the defendant as the acceptor of a bill of exchange, drawn by Thomas John Sparkes on the defendant for 5*l.*, payable two months after date to the order of the drawer, and by him indorsed to the plaintiff. *Second* count on an account stated. Pleas—*first*, to the first count, that the bill was accepted for a debt due from the defendant to T. J. Sparkes at the time of the discharge of the defendant under the Insolvent Debtors' Act, of which the plaintiff had notice; and that after the acceptance of the bill of exchange the defendant was discharged by the Insolvent Debtors' Court from the debt for which this bill of exchange was accepted. *Second*, to the first count, that the defendant was indebted to T. J. Sparkes, and was a prisoner for debt in the Fleet Prison, and had petitioned the Court for the Relief of Insolvent Debtors for his discharge; that T. J. Sparkes threatened to oppose his discharge, to prevent which he accepted this bill, whereof at the time of the indorsement of the bill the plaintiff had notice, and that the defendant was afterwards discharged by the Insolvent Debtors' Court from the debt for which this bill was accepted. *Third*, to the second count, non-assumpsit.

Replication to the first plea—that the plaintiff, at the time when the bill was indorsed, did not have the notice in that plea mentioned, (concluding to the country); and to the second plea, the like; and to the third plea, a similer (*a*).

(*a*) As the forms of the pleas and replication may be useful, we have subjoined them.

First plea.—And the defendant, by Charles Gaines, his attorney, as to the first count of said decla-

ration, saith that the bill of exchange in that count mentioned, and therein alleged to have been made and drawn by the said Thomas John Sparkes upon and accepted by him the said defendant,

Barstow, for the defendant.—I submit that the plaintiff must begin. We by our plea have thrown a stain upon the

1834.

WARNER
v.
HAINES.

was accepted by him the said defendant for and in respect of a certain debt or sum of money due and owing from said defendant to the said T. J. S. before the time of his the said defendant's discharge from prison by the Court for Relief of Insolvent Debtors in England, as hereinafter mentioned; whereof the said plaintiff before and at the time when the said T. J. S. indorsed said bills of exchange to the said plaintiff had notice. And the said defendant in fact saith, that he the said defendant afterwards, and after the accepting of the said bill of exchange, to wit, on the 25th day of April, 1834, by a certain order made by the Court for Relief of Insolvent Debtors in England, held at the Court House in Portugal Street, Lincoln's-Inn Fields, in the county of Middlesex, (the said defendant then being an insolvent debtor in custody and a prisoner in the Fleet Prison), was duly discharged according to a certain act of Parliament made and passed in the 7th Geo. 4th. intituled "An Act to amend and consolidate the Laws for the Relief of Insolvent Debtors in England," of and from the said debt in respect whereof said bill of exchange was so accepted by him as aforesaid; and that the said discharge still remains in full force, and this he is ready to verify, &c.

Second plea.—And for a further plea to the said first count, the defendant saith, that, before the making of the said bill of exchange in the said declaration

mentioned by the said T. J. S., and the acceptance of the same by the said defendant, he the said defendant was indebted to the said T. J. S. in a certain sum of money, to wit, the sum of 5*l.*, and being so indebted to the said T. J. S. and to divers other persons in divers other sums of money, and being an insolvent debtor in custody and a prisoner in his Majesty's prison of the Fleet, he the said defendant petitioned the Court for the Relief of Insolvent Debtors in England to be discharged from his said imprisonment, whereof the said T. J. S. had notice, and then threatened the defendant to oppose his discharge, unless he the said defendant would consent to accept a certain bill of exchange for the amount of the said debt, and thereupon he the said defendant heretofore, to wit, on 24th April, 1834, in order to induce said T. J. S. to abandon his said threat, and not to oppose the said discharge of him the said defendant, did then accept the said bill of exchange in the said first count of the said declaration mentioned; whereof the said plaintiff before and at the time when said T. J. S. indorsed the said bill of exchange to him the said plaintiff had notice: And said defendant further saith, that he the said defendant afterwards and after the accepting of the said bill of exchange in the said declaration mentioned as aforesaid, to wit, on the 25th April, 1834, by a certain order made by the Court for the Relief of Insolvent Debt-

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bill in the original making of it, and that stain is admitted by the replication. I submit, therefore, that the plaintiff must now shew that he came by the bill innocently. The alteration in the rules of pleading were not intended to affect in any way the rights of the parties. Under the old rules of pleading, if a defendant succeeded in tainting the bill in the hands of the payee, it was incumbent on the indorsee to shew that it had come into his hands under such circumstances as to make it available. It is true that the issue is on the notice; but the plaintiff must know in what way he took the bill, and he is the proper person to shew that.

Lord DENMAN, C. J.—I must look at the form of the record and see on whom the burden of proof lies. The

ors in England, held at the Court House in Portugal Street, Lincoln's Inn Fields, in the county of Middlesex, he the said defendant then being an insolvent debtor in custody and a prisoner in the Fleet Prison, was duly discharged according to a certain act of Parliament made and passed in the 7th Geo. 4th, intituled "An Act to amend and consolidate the Laws for the Relief of Insolvent Debtors in England," of and from the said debt, in respect whereof the said defendant so accepted the said bill of exchange; and that the said discharge still remains in full force, and this he the said defendant is ready to verify, &c.

Third plea.—Non-assumpsit to the last count of declaration.

Signed *Edw. Du Bois.*

Replication.—And the plaintiff as to the plea of the defendant by him first above pleaded to the said first

count saith, that the plaintiff did not, at the time when the said T. J. S. indorsed the said bill of exchange to the plaintiff, have the said notice of the premises in the said plea in that behalf mentioned, in manner and form as the defendant hath therein alleged; and this the plaintiff prays may be inquired of by the country, &c. And the plaintiff as to the plea of the defendant by him secondly above pleaded to the said first count says, that the plaintiff did not, at the time when the said T. J. S. indorsed the said bill to the plaintiff, have the said notice in the said plea in that behalf mentioned, in manner and form as the defendant hath therein alleged; and this the plaintiff prays may be inquired of by the country, &c. And the plaintiff as to the plea of the defendant by him lastly above pleaded, and whereof he hath put himself upon the country, doth the like.

plea avers that the plaintiff had notice of certain facts; and I think it lies on the defendant to prove the notice.

1834.

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HAINES.

Barstow relied on the case of *Northam v. Latouche* (a).

LORD DENMAN, C. J.—I do not at all question the authority of that case; on the contrary, as the law was at that time, I quite agree with all that is there laid down; but I think, that, as this issue is framed, the defendant must begin and prove the notice.

Barstow, for the defendant, opened his case; but, as he failed in proving the notice to the plaintiff—

LORD DENMAN, C. J., directed the jury to find for the plaintiff.

Verdict for the plaintiff.

Erle, and *Chambers*, for the plaintiff.

Barstow, for the defendant.

[Attornies—*Fry*, and *Gaines*.]

(a) *Ante*, Vol. 4, p. 140.

LAWRENCE v. THATCHER and Another.

Dec. 15th.

WORK and labour. Pleas—General issue, payment, and a set-off.

It was opened by *Erle*, for the plaintiff, that the de-

A. having assigned his stock in trade and business to two trustees, one of them directed the plaintiff

to go to Brussels to procure the liberation of A., who was detained there as a prisoner for debt, and it was arranged that Mr. L. should remit the plaintiff money while there. The plaintiff went there, and Mr. L. sent a letter to him there announcing that he had done so:—Held, that, in an action by the plaintiff against the trustees for a compensation for going that journey, the statements in Mr. L.'s letter were not evidence; and also, that the declarations of a person whom the trustees had placed at the house of business to manage the shop, were also not evidence to shew that the plaintiff was entitled to be paid for taking an account of the stock.

1834.

LAWRENCE
v.
THATCHER.

defendants were trustees of a person named Palmer, who had been a cutler in St. James's Street, and carried on the business under the powers contained in the trust-deed under which they acted; and that Palmer being in custody for debt at Brussels, the defendants employed the plaintiff to go there and procure his release, which he accordingly did, and for which the defendants would not pay him. The plaintiff also claimed to be paid for taking an account of the stock at the shop in St. James's Street.

It was proved that both the defendants acted as trustees; and that both being at the house at which the business was carried on, the defendant Thatcher came out of the room in which the other defendant was, and proposed that the plaintiff should go to Brussels and procure the liberation of Palmer; and said, "I as trustee will pay you;" and it was then agreed that Mr. Lawledge, the solicitor to the trustees, should remit money to the plaintiff when he was at Brussels.

It was proposed to put in the letter of Mr. Lawledge to the plaintiff while the latter was at Brussels.

Barstow, for the defendants.—I submit that what Mr. Lawledge writes is not evidence against the defendants.

Erle, for the plaintiff.—He is to remit the money; and in this letter he announces that he has done so.

Lord DENMAN, C. J.—If Mr. Lawledge remitted money, that is an act done; and if this letter is properly post marked, it is evidence that he sent a letter at that time; but I do not think that his letter is proof of the facts stated in it.

The letter was read.

The trust-deed, which was called for under a notice to produce, was put in. By it the defendants were appointed trustees to carry on the business of Mr. Palmer,

upon certain trusts, and by it the stock and business were transferred to them absolutely.

It was proved that a person named Follett had the management of the shop in St. James's Street, and that he had paid one of the witnesses in the name of the defendants as trustees for coals delivered there. It was proposed to give in evidence what Mr. Follett said respecting the plaintiff taking an account of the stock.

LORD DENMAN, C. J.—If he conducts the business he is an agent to bind the defendants in every thing that concerns the business, but not I think to employ a person to take stock.

Evidence was given that the defendant Thatcher five or six times saw the plaintiff engaged in taking the stock.

Verdict for the plaintiff.

Erle, and *Thomas*, for the plaintiff.

Barstow, for the defendants.

[Attornies—*Abrahams & R.*, and *Jennings & Co.*]

Adjourned Sittings in London, after Michaelmas Term, 1834.

BEFORE LORD DENMAN, C. J.

ICELY v. GREW.

Dec. 18th.

ASSUMPSIT for not completing a contract for the purchase of a house. Plea—Non-assumpsit.

In an action of assumpsit for not completing the purchase of

a house, the defendant cannot, under the general issue, set up as a defence that the sale was a sale by auction, and void on the ground of puffing, as this must be specially pleaded.

1834.

ICELY

v.

GREW.

One ground of defence was, that the property was sold at auction, at which there was puffing; and evidence was given that the bidding immediately before that of the defendant was by a puffer (a).

LORD DENMAN, C. J.—I think that the defendant cannot avail himself of this defence, under the plea of the general issue. He should have pleaded specially.

Addison, for the defendant.—I should submit, that, if the sale was void, it is in effect no sale at all, and therefore that the defendant never promised.

LORD DENMAN, C. J.—There is in fact a sale, which is avoided by a fraud (b). The plaintiff may take a verdict on my view of the effect of the pleadings; but I will give the defendant's counsel leave to move to enter a nonsuit, if the Court should think that the defendant could go into this defence under the general issue.

Verdict for the plaintiff, with leave to move.

Follett, for the plaintiff.

Moody, and *Addison*, for the defendant.

[Attornies—*J. Atkins*, and *John Nokes*.]

IN the ensuing term, *Addison* obtained a rule to shew cause why the verdict should not be set aside on grounds not at all affecting the proposition of law above laid down.

(a) The authorities on the subject of puffing at auctions will be found collected in Sug. Ven. and

Pur. tit. "Bidding."

(b) See the rule of H. T. 4 Will. 4, ante, p. 663, n. (a).

1834.

SEAYER v. SEAYER.

Dec. 18th.

ASSUMPSIT for money had and received, money paid, and on an account stated. Plea—Non-assumpsit.

This was an undefended cause.

It appeared that the plaintiff had accepted three bills of exchange for the accommodation of the defendant, and that he had been obliged to pay them; and also the costs of two actions which had been brought on two of them.

Lord DENMAN, C. J.—On these pleadings the plaintiff cannot recover the costs of the two actions. The plaintiff, to entitle himself to recover these, should have declared specially (a).

Verdict for the plaintiff for the amount of the bills of exchange only, without the costs.

Knowles, for the plaintiff.

[Attornies—*Hammet*, and *Beart*.]

(a) The form of such a special count will be found in 2 Chit. on Pleading, 124.

If A. has accepted three bills for the accommodation of B., and is obliged to pay them, and also to pay the costs of two actions brought upon two of them:—Held, that A. cannot, in an action against B., recover the amount of the costs of the two actions, if his declaration contain only the common money counts; but that to recover these costs, he should have declared specially.

COURT OF EXCHEQUER.

Adjourned Sittings at Westminster after Michaelmas Term, 1834.

BEFORE MR. BARON ALDERSON.

1834.

Nov. 29th.

BUXTON v. BAUGHAN.

A. put a phaeton into the possession of M. for him to paint it, and paid M. beforehand for the painting. M. never painted it, but placed it on the premises of B., where it stood three months:—Held, that B. had no lien on the phaeton for his charge for the standing of it, unless the jury were satisfied that M. placed it there by the authority of A.

A person has no right to keep the property of another, and charge for the standing of it, unless there was a previous bargain between him and the owner of the property, or between him and some agent authorized by the owner.

TROVER for a pony phaeton. Plea—General issue.

It appeared, that, in the year 1832, the plaintiff had a pony phaeton which required painting, and that he employed a person named Mackenzie to paint it, and paid him 2*l.* beforehand for so doing, which was all he was to have for the work. The phaeton was taken away by Mackenzie, and, it not being brought back, the plaintiff's servant made search for it, and, at the expiration of three months from the time at which it was taken away, he found it on the premises of the defendant.

It further appeared, that, in the month of August, 1833, the plaintiff, accompanied by a witness, went to demand the phaeton, and that the defendant then said that he did not know the plaintiff, and that, as the phaeton was left with him by Mackenzie, he should require the plaintiff either to produce Mackenzie, or an order from him, and also to pay two sovereigns for the standing of it. These terms the plaintiff refused to comply with; and, on the same witness calling again upon the defendant on a subsequent day, the latter said that he was satisfied that it was the plaintiff's phaeton, and that he might have it if he paid 2*l.* The phaeton had not been painted, and no repairs of any kind had been done upon it while it stood on the premises of the defendant.

Erle, for the defendant, opened that the defendant was

a person who was in the habit of taking carriages to stand on his premises for hire; and that, Mackenzie having brought this phaeton thither, it was agreed between him and the defendant that the phaeton should be allowed to stand there for a fortnight without any thing being paid; but that, if it stood longer, hire should be charged. He therefore submitted that the defendant had a lien on the phaeton for 2*l.*, the amount of the standing.

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ALDERSON, B.—If this was a bargain that the defendant could enforce against the plaintiff, there is no doubt that the defendant would have a lien; but, if he could only enforce it against Mackenzie, he has no lien. If it can be shewn that Mackenzie made this bargain, as the agent of the plaintiff, and by his authority, the claim of lien will be made out.

A witness stated that Mackenzie called on the defendant, and left the phaeton, saying that, if it stayed more than a fortnight, the defendant should charge him for its standing; but this witness also stated, that Mackenzie often brought carriages there, and was occasionally employed by the defendant to paint carriages for him.

ALDERSON, B. (in summing up).—If the defendant has refused to deliver up this phaeton to the plaintiff, he is guilty of a conversion, unless he had a right to demand 2*l.* for the standing of it. He has a right to demand it, no doubt, if the plaintiff made a bargain with him to that effect; but of that there is no evidence. It may be that Mackenzie has made this bargain; but then you must consider whether he was authorized to make it on account of the plaintiff and by his authority. The defendant cannot set up a bargain made by Mackenzie, unless Mackenzie had authority from the plaintiff to make such a bargain. If you trust your goods into a man's possession, and he makes a bargain about them without your authority, you

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are not bound by that bargain, and may reclaim the goods. The fact that the plaintiff's servant was three months before he could find out where the phaeton was does not look much like the plaintiff's having authorized a bargain to be made for the defendant to keep it at hire. A man has no right to keep my property, and charge for the standing of it, unless there was 'a previous bargain between him and me, or between him and some agent authorized by me. The defendant in this case insisted, that the plaintiff should produce Mackenzie, or procure an order from him: that too was a thing that he had no right to insist upon before he delivered to a person a thing that was that person's property. The defendant's witness does not say, that, when the phaeton was left, Mackenzie said that it was Mr. Buxton's phaeton, and that he was authorized by Mr. Buxton to place it there; but he says, that it was to stand for a fortnight without any payment; and that afterwards he (Mackenzie) should be charged for it, and not Mr. Buxton. If Mackenzie bargained with the defendant for the standing of this phaeton, as and for the plaintiff, and by the authority of the plaintiff, the defendant would be entitled to detain it till the standing was paid for; but if that were not so, the defendant had no right to detain it from the plaintiff.

Verdict for the plaintiff.

Adams, Serjt., and *Petersdorff*, for the plaintiff.

Erle, for the defendant.

[Attornies—*J. Wells*, and *Holmes*.]

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BEFORE LORD LYNTHURST, C. B.

WILTON v. EDWARDS.

Dec. 3rd.

TRESPASS.—The *first* count of the declaration stated, that the defendant broke and entered the plaintiff's house, and assaulted her. *Second* count, that the defendant assaulted the plaintiff, and took away a piano-forte. Pleas, *first*,—Not Guilty. *Second*, as to entering the house, and taking the piano-forte, that the piano-forte belonged to the defendant, and had been feloniously stolen from him by one Lewis; that the piano-forte, being in the plaintiff's house, the defendant entered to retake it, the outer door being open; and that he tried to retake it, when the plaintiff assaulted him, and he thereupon assaulted her. *Third*, as to the breaking of the house, an exactly similar plea. *Fourth*, to the assault in the first count, *son assault demesne*. And *fifth*, the like to the assault in the second count.

It appeared from the evidence on the part of the plaintiff, that she, wishing to give her daughter a piano-forte on the occasion of her marriage, applied to Lewis, who used to visit at her house, to sell her one, he being a stationer, and also a general dealer in various other articles; and that, on the 24th of December, 1833, the daughter having looked at a cottage piano-forte at his shop, a deposit of 20*l*. was paid on it; and, on the piano-forte being sent home, the rest of the bill was paid to Lewis, and a receipt taken. It further appeared, that the defendant and two other men came to the plaintiff's house, and took the piano-forte to carry it away; and that the plaintiff took hold of one of the pillars in front of the piano-forte to prevent him, and that he then struck the back of her hand, and made it bleed. After this a sergeant of police and some policemen insisted on the parties going to a police-office with the piano; and, on this being done,

In trespass for taking a piano-forte, which the plaintiff had bought of L., the defendant pleaded that it belonged to him, and had been feloniously stolen from him by L., and that he retook it:—Held, that whatever would be evidence against L. if he were on his trial for the felony, is evidence in this action to prove the felony to have been committed by L.

It being opened that L. had committed the felony by hiring the piano-forte and selling it immediately:—Held, that the defendant could not give evidence respecting optical instruments which were alleged to have been obtained by L. from another tradesman.

If a carman take goods to the house of L., not knowing him, and ask for Mr. L. of a person whom he finds in the house, and that person says, "I am Mr. L.," this is *prima facie* evidence that he was L.

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the magistrate ordered the piano-forte to be carried back to the plaintiff's house; and it was placed in the house-passage, where it remained for a few minutes, when the defendant came again, and having given the plaintiff a push, the piano-forte was finally taken away by five or six men, who accompanied him.

Thesiger, for the defendant, opened, that this piano-forte had been, on the 24th of December, 1833, hired by Lewis of the defendant, he intending to steal it; and that that being so, although the plaintiff might have bought and paid for it *bond fide*, the defendant was entitled to retake it wherever he found it.

For the defence, a carman named Cheek was called. He said, "In December last, I took a piano-forte from the defendant to Lewis. There was no bill or receipt sent with it; it was upon hire. Lewis said it was only to stay a short time."

Another carman was also called. He said, "I accompanied the last witness to Mr. Lewis's shop. I do not know Mr. Lewis. I asked for Mr. Lewis, and a person in the shop said, 'I am Mr. Lewis.'"

LORD LYNTHURST, C. B.—This is *prima facie* evidence that this person was Lewis.

Thesiger, for the defendant, proposed to give evidence respecting some optical instruments, which it was alleged had been obtained by Lewis from an optician named Schalmander.

Bompas, Serjt., for the plaintiff.—I must object to evidence being given of all Lewis's dealings.

LORD LYNTHURST, C. B.—In fixing the stealing of this piano-forte upon Lewis, you may give evidence of any

thing that would be evidence against him if he were now on his trial for the felony; but you cannot go into evidence of other felonies.

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Thesiger.—It is a question of intention. The question is, whether he obtained this piano-forte with intent to steal it; therefore, the conduct of the party as to other goods may be material.

Lord LYNTHURST, C. B.—I have heard a great many charges of felony of this kind tried, and never knew of such evidence being received.

The evidence was rejected.

Lord LYNTHURST, C. B., in summing up.—If you believe the witnesses for the plaintiff as far as relates to the second assault committed after the piano-forte was taken back, the plaintiff is for that entitled to a verdict, as it is not pretended, that, on that occasion, the plaintiff assaulted the defendant. With regard to the piano-forte, the question is, whether it was stolen by Lewis. And on this point it is said that Lewis, under pretence of hiring it, but intending to steal it, got it into his possession, and then sold it to the plaintiff. If before he hired it he intended to sell it, and his hiring it was a mere colour, that would amount to a felony. However, there is no evidence that the piano-forte was hired, except the statement of the carman, who is a mere carman, and not a servant of the defendant. Even if the piano-forte was stolen, I think that the pleas of justification are not made out; but I wish you to tell me whether or not you are satisfied that the piano-forte was or was not feloniously stolen by Lewis.

Verdict for the plaintiff—Damages, 50*l.*, the jury stating that they considered that no felony was made out.

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Bompas, Serjt., and *G. J. Williams*, for the plaintiff.

Thesiger, and *R. V. Richards*, for the defendant.

[Attornies—*Jacobs*, and *W. C. Humphreys*.]

BEFORE MR. BARON GURNEY.

Dec. 4th.

HORNER v. WATSON.

When the jury have returned a verdict, the Judge will not hear the reasons on which they founded their verdict, though the jury may desire to state their reasons.

DEBT for penalties on the Statute of Usury, 12 Anne, st. 2, c. 16, for taking interest at a greater rate than five per cent.

GURNEY, B., had left it to the jury to say, whether a greater interest than five per cent. had been taken; and if so, whether it had been taken within one year before the commencement of the action.

The jury retired, and on their return the foreman said, that they found a verdict for the defendant; and stated that they were willing to give their reasons for their verdict: and another of the jury said, that they wished to give their reasons.

GURNEY, B.—I have left certain questions to you, and have made such observations as I felt it my duty to make upon those questions. You have, no doubt, maturely considered the questions, and also my observations respecting them, and have drawn your own conclusions; and your having done so, I think that I ought not to hear the grounds on which you have found your verdict.

Thesiger, and *Cottingham*, for the plaintiff.

Erle, and *Addison*, for the defendant.

[Attornies—*Todd*, and *Stephens*.]

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Dec. 4th.

BECKWITH v. BENNER and SIMPSON.

ASSUMPSIT.—The *first* count of the declaration stated, that, by an agreement, dated Dec. 6th, 1805, between the testamentary guardians of the plaintiff, then a minor, and William Barber, the former let to the latter certain premises from the 6th of April for one year, and thence forward from year to year so long as the parties should think proper, determinable by six months' notice in writing at the expiration of any one year, at a rent of 12*l.* 12*s.*; and that Wm. Barber undertook to repair. That, on the 23rd of December, 1815, plaintiff attained the age of twenty-one years, and that Barber continued in possession on the same terms; that, on the 2nd of March, 1821, Barber died, having appointed the defendants his executors; that the defendants thereby became by assignment of law possessed of Barber's right, title, and interest; that the defendants, in consideration of the plaintiff omitting to give six months' notice, and allowing them to continue in possession, undertook and promised to hold on upon the same terms. Breach—that, on the 6th of April, 1838, there was one year's rent due, and the premises were out of repair. The *second* and *third* counts were nearly similar. The *fourth* count stated, that the defendants undertook to keep and leave the premises in a tenant-like and proper manner. *Fifth* count for use and occupation. The declaration also contained the money counts. Pleas by the defendant Simpson—Non-assumpsit and the Statute of Limitations. The defendant Benner had suffered judgment to go by default.

To prove that the defendants were executors of Mr. Barber, the probate of his will was put in. By that it appeared that the defendants were his executors, and had

If an instrument offered in evidence is objected to as being improperly stamped, the party offering it may either go into the rest of his evidence and send the instrument to the Stamp Office to be stamped anew, taking the chance of its coming back sufficiently early, or his counsel may argue the objection, taking the stamp as it is; but if the instrument be sent away to the Stamp Office, the Judge will not allow any argument as to the original stamp being proper.

In an action against A. and B. as executors, A. had suffered judgment by default. The probate of the will was produced, and notice had been given to both the defendants to produce a receipt which had been given to A. as one of the executors:—Held, that if it was not produced, secondary evidence might be given of its

contents, and that A.'s having suffered judgment by default made no difference:—Held, also, that the clerk of Mr. S., an attorney, might be asked whether A. and B. did not, as executors, employ Mr. S. as their attorney.

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proved his will, leave being given to a third executor (Mr. Warner) to come in and prove afterwards.

On the part of the plaintiff, Mr. Nelson, a clerk of Mr. Bonner, an attorney, was called; and *Adams*, Serjt., proposed to ask him—Did the defendants, as executors of Mr. Barber, employ Mr. Bonner to act for them as their attorney?

Bompas, Serjt., for the defendants.—A clerk of an attorney is privileged the same as the attorney himself. If Mr. Bonner was employed by the defendants, he could not be allowed to state the character in which they employed him. The statement of the character in which they employed him is privileged.

GURNEY, B.—If Mr. Bonner was called, he would be asked whether the defendants employed him as executors. If both of them employed him jointly, they could, as they were not partners, only have done so as executors.

The question was put—

It was proved that the defendants had both paid rent for these premises, and that the receipts were given to them in the name of the executors of the late Mr. Barber.

A notice to produce the receipts had been served on both the defendants, and a witness was called to prove the contents of a receipt given to the defendant Benner.

Bompas, Serjt.—Does your Lordship think, that, as he has let judgment go by default, this notice to produce given to him lets in secondary evidence against the other defendant.

GURNEY, B.—They were joint executors, and had made joint payments before. I am quite clear that it is admissible.

The evidence was received.

The original agreement between the testamentary guardians of the plaintiff and William Barber was offered in evidence. It bore a 1*l*. stamp and a 16*s*. stamp, which latter stamp had the word "agreement" imprinted upon it.

Bompas, Serjt., objected, that this stamp was not sufficient under the stat. 44 Geo. 3, c. 98, (the Stamp Act then in force), as this was a demise; and the stamp should be 1*l*. 10*s*.: and he further objected, that the 16*s*. stamp would not avail the plaintiff under the stat. 55 Geo. 3, c. 184, s. 10, as the word "agreement" appeared upon it.

Adams, Serjt., sent away the deed to the Stamp Office to have a further stamp put upon it, and was proceeding to argue that the stamps were sufficient.

GURNEY, B.—If you send away the deed, there is in fact no deed here to argue upon; and I cannot allow the argument. You may either go on with the rest of your evidence, and take the chance of the deed coming back in time from the Stamp Office with an additional stamp; or you may consider the deed as still here for the purposes of your argument, and stand or fall by the sufficiency of the stamps already on it; but I think you ought not to do both. You ought not to take the chance of a decision in your favour on an argument; and then, having consumed some hours of the public time in that argument, put in the deed with a new stamp, and free from objection.

Adams, Serjt., said, that he would rely upon the deed in its original state, and take it as if no other stamp were added.

GURNEY, B., directed a verdict for the plaintiff, giving the defendants' counsel leave to move to enter a nonsuit, on the ground that the stamps were not sufficient, and on

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several other points of law which were stated by the defendants' counsel.

Verdict for the plaintiff, with leave to move.

Adams, Serjt., and *J. Jefferys Williams*, for the plaintiff.

Bompas, Serjt., and *Busby*, for the defendant Simpson.

[Attornies—*J. Williams*, and *Tooke & Co.*]

IN the ensuing term, *Busby* moved in pursuance of the leave given; and the Court granted a rule to shew cause, on grounds not at all affecting the points of law above stated.

Dec. 8th.

MORIARTY v. BROOKS.

IF, in an action for an assault, the defendant plead that he was possessed of a public-house, in which the plaintiff was making a disturbance, and that, the plaintiff refusing to depart, the defendant laid hands on him, and turned him out. This plea is proved, if it be shewn, that, in consequence of the plaintiff refusing to go, the defendant assaulted him, with a view of turning him out of the house, though in fact the defendant could not succeed in actually turning the plaintiff out.

ASSAULT.—The declaration stated, that the defendant had assaulted, beaten, and wounded the plaintiff. Pleas, *first*, to the whole declaration, not guilty; *second*, (as to the assault and battery only), *son assault demesne*; *third*, (to the assault and battery only), a special plea, which stated that the defendant was possessed of a public-house, and that the plaintiff was there making a noise and disturbance, and conducting himself in a quarrelsome manner; that the defendant requested him to depart, and that he refused to do so; and that the defendant then gently laid

If A. comes up to attack B., and B. puts himself into a fighting attitude to defend himself, this is not an assault by B., and will not, in an action by B. against A. for an assault, support a plea by A. of *son assault demesne*.

In criminal cases, the definition of a wound is, an injury to the person, by which the skin is broken. A defendant's counsel, in addressing the jury, has no right to say to the jury that he shall call witnesses, unless they inform him that they are satisfied that the defendant is entitled to a verdict as the case stands; he must either call his witnesses, or close his case without saying any thing about them.

hands on him, and removed him from the house. Repliation, *de injuriâ*.

From the evidence on the part of the plaintiff, it appeared that the plaintiff was in the defendant's public-house, and that, in consequence of a dispute between them respecting payment for a pot of half-and-half, the defendant struck the plaintiff, who thereby received a cut under the eye, which bled.

Bompas, Serjt., in addressing the jury for the defendant, said that he must call witnesses, unless the jury were satisfied by the evidence that the defendant was entitled to a verdict.

LORD LYNDEHURST, C. B.—You have no right to ask the jury their opinion in that way; you must either call your witnesses, or else close your case without saying any thing about them.

The evidence for the defendant proved, that the plaintiff was in the defendant's public-house, and that, after the dispute respecting the pot of half-and-half, the defendant came up to the plaintiff as if to attack him, and that the plaintiff then put himself into a fighting attitude, and a scuffle ensued, in which the plaintiff received a cut over the eye, which bled; and that the defendant did not turn the plaintiff out of the house, but, at the conclusion of the scuffle, let him stay where he was before.

LORD LYNDEHURST, C. B.—If a person comes up to attack me, and I put myself in a fighting attitude to defend myself, this is not an assault on my part, and will not make out for that person a plea of *son assault demesne*. Besides, it appears that the defendant did not turn the plaintiff out; he only laid hold of him, and struck him (a).

(a) See the case of *Howell v. Jackson*, post.

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Bompas, Serjt.—If the defendant laid hold of the plaintiff for the purpose of turning him out, it would be sufficient to support the plea.

Thesiger, in reply.—The special plea does not go to the wounding; and the plaintiff is clearly entitled to a verdict on that part of the case. If the defendant committed the assault in endeavouring to turn the plaintiff out, I admit that the special plea is proved; but, if he did it merely to wreak his vengeance on the plaintiff, even that part of the defence will fail.

Lord LYNDHURST, C. B.—The first question is, whether this assault was committed by the defendant in endeavouring to turn the plaintiff out of the house. If the jury think so, I think that the special plea is made out; and whether too great violence was used is immaterial, as there is no new assignment. The special pleas do not justify the wounding; and, if there was a wound, the plaintiff is entitled to recover for that.

Bompas, Serjt.—I should submit, that what is proved does not amount to a wound.

Lord LYNDHURST, C. B.—The definition of a wound in criminal cases is an injury to the person, by which the skin is broken. If the skin is broken, and there was a bleeding, that is a wound (*a*).

His Lordship (in summing up) said—If the violence which occurred took place in an endeavour by the defendant to turn the plaintiff out of the house, the third plea is proved. However, this plea does not profess to justify

(*a*) With respect to wounding, see the cases of *Rex v. Wood*, ante, Vol. 4, p. 381; *Rex v. Withers*, Id. p. 446; *Rex v. Payne*, Id. p. 558; and *Rex v. Shadbolt*, ante, Vol. 5, p. 504.

any wounding; therefore, if there was a wound, the plaintiff is entitled to recover for that. It is proved that the plaintiff was cut under the eye, and that it bled; and I am of opinion that that is a wound. If you think that the assault was not committed in an endeavour to turn the plaintiff out of the house, the justification entirely fails.

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Verdict for the plaintiff on all the issues—
Damages, 1s.

Thesiger, and *Mansel*, for the plaintiff.

Bompas, Serjt., for the defendant.

[Attornies—*C. Walter*, and *Virgo*.]

BEFORE MR. BARON GURNEY.

ATKINSON v. WARNE.

Dec. 8th.

ASSAULT and false imprisonment.—(There was no general issue pleaded.) Plea, that, on the 13th of July, 1834, the plaintiff feloniously stole twenty pounds of feathers out of a bed, let to him to be used with divers rooms in a dwelling-house, wherefore the defendant assaulted and beat the plaintiff, and gave him in charge to Thomas Boyce, the said T. B. then being one of the me-

In an action for false imprisonment, the defendant pleaded that the plaintiff had stolen feathers from a bed in a ready-furnished bed-room, let to him by the defendant, and that he therefore

gave the plaintiff into the custody of a policeman, who, because the plaintiff resisted, beat the plaintiff, and took him to a station-house. There was no evidence, either of any resistance by the plaintiff, or of any blow given to him by the policeman:—Held, that, on proof of the other allegation, the plea was substantially made out.

If A. and B. rent a ready-furnished bed-room jointly, and both are taken into custody in the bed-room, charged with jointly stealing feathers from the bed, and, on a search, pawnbrokers' duplicates are found on one of them:—Held, that these duplicates are receivable in evidence against the other, on a plea of justification to any action for false imprisonment brought by that other.

In an action for false imprisonment, if the defendant plead as a justification that the plaintiff stole feathers, and that he was therefore imprisoned, and the plaintiff reply, *de injuria*, the plaintiff is entitled to begin, although this is no plea of the general issue, and the affirmative is on the defendant.

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ropolitan police-officers according to the statute, and a peace-officer of our lord the King, duly authorised in that behalf; "and on that occasion the said T. B., so being such peace-officer as aforesaid, at the request of the said defendant, did assault the said plaintiff, and take the said plaintiff into his custody; and, because the said plaintiff did resist, did beat the said plaintiff, and did oblige the said plaintiff to go to a station-house, and did keep him there for a reasonable time; and, as soon as conveniently could be, conveyed him in custody before John Rawlinson, Esq., one of the justices assigned to keep the peace, and also to hear and determine divers felonies, &c. concerning the premises, and to be dealt with according to law." Repliation, *de injurid.*

F. V. Lee, for the plaintiff.—There is no general issue pleaded; but I believe, in cases of this kind, the plaintiff now begins, although by the plea the affirmative is on the defendant.

GURNEY, B.—That is now the rule (*a*).

F. V. Lee, for the plaintiff, opened his case, and called Boyce, the police-officer, who proved that he took the plaintiff and his son into custody at the desire of the defendant; and that, when taken before Mr. Rawlinson, the magistrate, they were both discharged. This witness, on his cross-examination, stated, that the plaintiff and his son were lodgers in a ready-furnished room in the defendant's house; and that, when he was called in, he found feathers on the clothes of the plaintiff's son, and on the floor of the room, and that feathers had evidently been taken from the bed in the room. This witness further stated, that the plaintiff and his son, being both present, he took both into custody, and found pawnbrokers' duplicates in the possession of the son.

(*a*) See the case of *Carter v. Jones*, ante, p. 64.

F. V. Lee.—Does your Lordship think that the plaintiff is answerable for duplicates found upon his son?

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GURNEY, B.—Yes. Both occupied the room; both were together when taken into custody; and both were taken on a joint charge. The jury must look at the whole transaction.

The evidence was received of the contents of the duplicates, notice having been given to produce them.

On the part of the defendant, evidence was given to prove that the room was let ready-furnished to the plaintiff; and evidence was also given, with a view of shewing that the plaintiff had committed the felony.

F. V. Lee, in reply.—To substantiate this plea, it is not enough that there should be a suspicion of felony, or even that the plaintiff's son was guilty of felony. It must be shewn that a felony was actually committed, and that it was committed by the plaintiff. Another allegation in the plea is not proved. It is there stated, that the plaintiff made resistance after he was taken into custody by the police-officer, and of that there is no evidence whatever.

GURNEY, B.—I think that the plea is substantially made out, if the jury are satisfied that a felony was in fact committed by the plaintiff.

His Lordship left it to the jury to say, whether either the plaintiff alone, or the plaintiff and his son jointly, had stolen the feathers.

Verdict for the defendant.

F. V. Lee, and *Petersdorff*, for the plaintiff.

Thesiger, for the defendant.

[Attornies—*Dicas*, and In person.]

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BEFORE MR. BARON ALDERSON.

Dec. 10th.

BURGHART v. ANGERSTEIN.

If a person of full age orders clothes, however extravagantly and absurdly, and they are delivered to him, he is bound to pay for them; but with a minor it is otherwise. A minor is only liable for necessities suitable to his state and degree, and the jury must consider not only whether the clothes were suitable in point of quality, but also in point of quantity.

If a minor has been supplied with ten coats from another tradesman, and immediately after that the plaintiff supplies him with another, the plaintiff will not be entitled to be paid for that other coat, as it was unnecessary.

If a minor is supplied with necessities suitable to his estate and degree, no matter from what quarter, a tradesman cannot recover for any further supply made to the minor just after.

In an action for the price of clothes, brought by a tailor against a minor, the defendant may go into evidence to shew that he had all the clothes which were suitable to his estate and degree from other tailors; and if he *in fact* had such clothes from them, it makes no difference that he has not paid for them, or even that he has successfully defended an action brought by one of them to recover the price of the clothes supplied by him.

An entry in the baptismal register, that the defendant was born on a day there mentioned, is no evidence of that fact.

An offer made by the attorney of the defendant's father is no evidence against the defendant; and the fact of the defendant afterwards employing the same attorney makes no difference.

ASSUMPSIT by the plaintiff, as the surviving partner of James Hummel, for goods sold and delivered, work done, and materials found, and upon an account stated. Pleas, *first*, non-assumpsit; *second*, infancy; *third*, as to the goods in the first count, and the work and materials in the second count, that the defendant was at the time when, &c., an infant, and that, before the commencement of the action, the defendant paid to the plaintiff 200*l.*, which sum was paid for the purpose of paying and satisfying so much of the goods in the first count as were necessities, suitable to the estate and condition of the defendant at the time. Replication to the first plea, a *similiter*. To the second plea, as to all except 10*l.*, that the goods and the work and materials were necessary to the plaintiff's degree, estate, and condition; and as to 10*l.*, parcel of the sums due and owing for goods sold, work, and materials, and on an account stated, that the defendant was of full age. To the third plea, as to the sum of 200*l.*, that the defendant did not pay it in manner and form &c.; and as to all the sums for goods sold, except 10*l.*, that they were necessities; and, as to the

sum of 10*l.* for goods, work, and materials, that the defendant was of full age.

Rejoinder.—To the *replication to the second plea*, as to all but 10*l.*, that the goods, work, and materials were not necessities; and as to the 10*l.* for goods sold, work, and materials, and on an account stated, a *similiter*. To the replication to the third plea, as to the payment, a *similiter*; and, as to all except the goods paid for, and the 10*l.*, that the goods were not necessities; and, as to the 10*l.*, a *similiter* (a).

(a) As the form of the pleadings may be useful in practice, we have subjoined the *third plea*, the *replication* to it, and the *rejoinder*.

Third plea.—And for a further plea in this behalf, as to so much of the said supposed promises in the declaration mentioned as relates to the goods in the said first count mentioned, and therein alleged to have been sold and delivered by the plaintiff and the said James Hummel, in the lifetime of the said James Hummel, to him the defendant, and to the work and materials in the second count mentioned, and which work is therein alleged to have been done, and which materials are therein alleged to have been provided by the plaintiff and the said James Hummel for the defendant, at his request, the defendant says, that he at the time of the sale and delivery of the said goods, and at the time of the doing of the said work, and providing the said materials, and at the time of making so much of the said supposed promises in the declaration mentioned, as relates to the said goods, work, and ma-

terials, was an infant, within the age of twenty-one years; and that he, before the commencement of this suit, to wit, on the 31st day of January, 1833, paid the plaintiff, as survivor of the said James Hummel, for and on account of the said goods, work, and materials, a certain sum of money, to wit, the sum of 200*l.*, and which sum of 200*l.* so paid to the plaintiff as aforesaid, was in full and sufficient payment and satisfaction of and for, and was paid by him, the defendant, for the purpose of paying, satisfying, and discharging, and with intent to pay, satisfy, and discharge, and has paid, satisfied, and discharged so much and all of the goods in the said first count mentioned as and which were necessities suitable to the degree, estate, and condition of the defendant, at the time of the sale and delivery of the said goods in the said first count mentioned, and at the time of making so much of the supposed promises in the declaration mentioned as relates thereto, and of and for so much and all of the said work in the said second count mentioned as and which was done,

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and so much and all of the said materials in the said second count mentioned as and which were provided in and about the making and providing necessities, or doing, or procuring, or relating to necessities suitable to the estate, degree, and condition of the defendant, at the time of doing the said work, and providing the said materials, and at the time of making so much of the said supposed promises in the declaration mentioned as relates thereto; and this the defendant is ready to verify, &c.

Replication.—And as to the said plea of the defendant by him lastly above pleaded, so far as the same respects the said sum of money in that plea alleged to have been paid to the plaintiff by the defendant, the plaintiff saith, that he, by reason of any thing by the defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the defendant, because he saith that the defendant did not pay to him, the plaintiff, the said sum of money in the said last plea mentioned, or any part thereof, in manner and form as the defendant hath above in his said last plea in that behalf alleged; and this he the plaintiff prays may be inquired of by the country, &c. And as to the said plea of the defendant by him lastly above pleaded, so far as the same respects the said several sums of

tioned to be due and owing to the plaintiff in respect of goods sold and delivered by the plaintiff and the said James Hummel to the defendant, in respect of work done and materials for the same provided by the plaintiff and the said James Hummel for the defendant, except as to the sum of 10*l.*, and except as to the said sum of money in the said last plea alleged to have been paid by the defendant to the plaintiff, the plaintiff saith, that he, by reason of any thing by the defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action against the defendant in respect of the said several sums of money, except as aforesaid, because he saith, that, except as to the said respective sums, parcel &c., in the introductory part of this replication mentioned, the said goods in the said declaration mentioned to have been sold and delivered by the plaintiff and the said James Hummel to the defendant, and the said work therein mentioned to have been done, and materials for the same provided by the plaintiff and the said James Hummel for the defendant, were, at the times of the sale and delivery thereof, and the doing and providing of the same, necessities suitable to the then degree, estate, and condition of the defendant; and this he the plaintiff is ready to verify; wherefore he prays judgment, and his damages by him sustained on occasion of the not

19th of October, 1839, and the 29th of October, 1830, to the defendant Mr. Frederick Angerstein, a cornet in the First

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performing of the said promise in the said declaration mentioned, as to the said several sums of money in the introductory part of this replication mentioned, (except as aforesaid), to be adjudged to him, &c. And as to the said plea of the defendant by him lastly above pleaded, so far as the same respects the said sum of 10*l.*, parcel of the said several sums of money in the said declaration mentioned to be due and owing to the plaintiff, and for goods sold and delivered by the plaintiff and the said James Hummel to the defendant, and for work done and materials for the same provided by the plaintiff and the said James Hummel for the defendant, the plaintiff saith that he, by reason of anything by the defendant in that plea above alleged, ought not to be barred from having and maintaining his aforesaid action against him in respect of the said sum of 10*l.*, parcel &c., because he saith that the defendant, at the time of the making of his said promise in the said declaration mentioned, as to the said sum of 10*l.*, parcel &c., was of the full age of twenty-one years, and not within the age of twenty-one years, in manner and form as the defendant hath above in his said plea in that behalf alleged, and this he the plaintiff prays may be inquired of by the country, &c.

Rejoinder.—And the defendant, as to the said replication of the plaintiff to the said plea of the defendant by him secondly above

pleaded, so far as the same respects the several sums of money in the declaration mentioned, and therein alleged to be due and owing to the plaintiff in respect of goods alleged to have been sold and delivered by the plaintiff and the said James Hummel, and in respect of work alleged to have been done and materials for the same alleged to have been provided by the plaintiff and the said James Hummel for the defendant, except as to the sum of 10*l.*, parcel of the said several last-mentioned sums of money, says that the plaintiff ought not, by reason of anything in that replication alleged, to have or maintain his aforesaid action thereof against him, the defendant, in respect of the said several last-mentioned sums of money, except as aforesaid, because he says that the goods in the declaration mentioned, and therein alleged to have been sold and delivered by the plaintiff and the said James Hummel to the defendant, and the said work therein mentioned and therein alleged to have been done, and the said materials for the same therein mentioned and therein alleged to have been provided by the plaintiff and the said James Hummel for the defendant, except as aforesaid, were not at the time of the sale and delivery thereof, and doing and providing of the same, necessities suitable to the then degree, estate, and condition of the defendant, in manner and form as the plaintiff has in his said replica-

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Life Guards, and the second son of Mr. Angerstein, who lived in St. James's Square. Most of the articles were

tion in that behalf alleged, and of this the defendant puts himself upon the country, &c., and the plaintiff doth the like, &c. And as to the said replication of the plaintiff to the said plea of the defendant by him secondly above pleaded, so far as the same respects the said sum of 10*l.*, parcel of the said several sums of money in the said declaration mentioned, and therein alleged to have been sold and delivered by the plaintiff and the said James Hummel to the defendant, and for work therein alleged to have been done, and materials for the same therein alleged to have been provided by the plaintiff and the said James Hummel for the defendant, and so far as the second plea respects the said sum of money in the declaration mentioned, and therein alleged to have been found to be due and owing from the defendant to the plaintiff and the said James Hummel on an account stated between them, and which the plaintiff has prayed may be inquired of by the country, the defendant does the like; and as to the said replication of the plaintiff to the said plea of the defendant by him lastly above pleaded, so far as respects the said sum of money paid to the plaintiff by the defendant, and which the plaintiff has prayed may be inquired of by the country, the defendant does the like, &c.; and as to the said replication of the plaintiff to the said plea of the defendant by him lastly above pleaded, so far as the same respects the

said several sums of money in the declaration mentioned, and therein alleged to be due and owing to the plaintiff in respect of goods alleged to have been sold and delivered by the plaintiff and the said James Hummel to the defendant, and in respect of work alleged to have been done, and materials for the same alleged to have been provided by the plaintiff and the said James Hummel for the defendant, except as to the sum of 10*l.*, and except as to the said sum of money paid by the defendant to the plaintiff, as in the said last plea mentioned, the defendant says that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, that the said goods in the said declaration mentioned, and therein alleged to have been sold and delivered by the plaintiff and the said James Hummel to the defendant, and the said work therein mentioned and therein alleged to have been done, and the said materials for the same therein mentioned and therein alleged to have been provided by the plaintiff and the said James Hummel for the defendant, except as to the said respective sums, parcel &c., in the introductory part of that replication mentioned, were not, at the time of the sale and delivery thereof, and the doing and providing of the same, necessities suitable to the then estate, degree, and condition of the defendant, in manner and form as the plaintiff has in his said last-mentioned re-

delivered between 19th of October 1829 and the month of July 1830.

Evidence was given of the delivery of the different articles; and one of the witnesses stated that Mr. Brooksbank, the defendant's attorney, had, before the action, said that the defendant's father would pay 15*s.* in the pound on the amount of the plaintiff's claim. It appeared that Mr. Brooksbank was then the attorney of the defendant's father, and not at that time the attorney of the defendant.

ALDERSON, B.—An offer made by the attorney of his father will not be evidence against the defendant; and the fact of the defendant afterwards employing the same attorney will make no difference.

It appeared that in the bill were charged 19 coats, (exclusive of military dress), 45 waistcoats, and 38 pairs of trousers. And there were included in the bill cashmere shawl waistcoats at eleven guineas each, a black velvet dressing gown, and a racing jacket.

Follett, for the defendant, opened that the defendant was under the age of twenty-one years, and that the plaintiff had been paid 216*l.* by the father of the defendant, and also 200*l.*, which had been paid into Court

plication in that behalf alleged; and of this the defendant also puts himself upon the country, &c., and the plaintiff doth the like, &c. And as to the said replication of the plaintiff to the said plea of the defendant by him lastly above pleaded, so far as the same respects the said sum of 10*l.*, parcel &c., and which the plaintiff has prayed may be inquired of by the country, the defendant doth the like, &c.

It was suggested, that the object of the plaintiff in the replication, stating that 10*l.* of the amount was for goods supplied after the defendant became of age, was to compel the defendant to call a witness to prove when he attained his majority, which would insure 'the plaintiff's counsel the reply; but this could not have been necessary, as there was the plea of non assumpsit.

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in a former action, brought by the plaintiff against the defendant, and in which the former had been nonsuited, because he could not then prove the delivery of the goods. He submitted, that those sums would more than cover all the necessaries supplied to the defendant during the time in question, more especially as the defendant had, during the same period, been supplied with clothes by other tailors besides the plaintiff. He cited the cases of *Ford v. Fothergill* (a), and *Story v. Pery* (b).

To prove that the defendant was not twenty-one years of age at the time when the clothes were supplied, an examined copy of the register of his baptism was put in. By this it appeared that he was baptized on the 15th of February, 1810; and it was also entered in the baptismal register that he was born on the 30th of December, 1809.

ALDERSON, B.—The entry in the register of the time of the defendant's birth is no evidence of that fact.

Two witnesses were called who were servants in the house of the defendant's father when the defendant was born, and they proved that he was born on the 30th of December, 1809.

Several master tailors were called, to prove that they supplied the defendant with various articles of clothes during the period comprised in the plaintiff's demand, and that they had been paid for them.

Erle, for the plaintiff.—I would submit to your Lordship that evidence of a supply of clothes by other tailors is not receivable in this case.

ALDERSON, B.—I think it is evidence in this way. The question is as to each item of the plaintiff's demand. Was it necessary for the defendant, or had he got such an ar-

(a) 1 Esp. 211.

(b) Ante, Vol. 4, p. 526.

ticle before? I must receive evidence of any article of clothes having been supplied to him elsewhere, as shewing the state of his wardrobe at the time, and thereby shewing what he was not in want of, and what was therefore unnecessary for him.

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It appeared that the defendant, during the period in question, had been supplied with clothes by Messrs. Stultz & Housley to the amount of 41*l.* 9*s.* 6*d.*; but that an action having been brought for it, the jury found a verdict for the defendant, and Messrs. Stultz & Housley had therefore not been paid.

Erle.—The defendant certainly ought not to have the advantage of this amount, as he never paid Messrs. Stultz & Housley.

ALDERSON, B.—If the defendant in fact had clothes of Messrs. Stultz & Housley to that amount, it makes no difference whether he paid for them or not. The question here is, what was necessary? And if the defendant in fact had these clothes from Messrs. Stultz & Housley, he did not want such from the plaintiff; and, if he had such from the plaintiff, they were not necessary.

Evidence was given of the payment of 21*l.* and 20*l.*, made on behalf of the defendant to the plaintiff.

Erle, in reply.—It is extremely difficult to lay down any definite rule as to what clothes shall be considered necessary for a young gentleman; and in each case the jury must exercise their discretion. It is true, that some of the articles in the plaintiff's bill are unusual; but the defendant was a young officer in the guards, and being placed by his friends in that situation, he must be expected to have such things as other persons who were in that station would have. The defendant in this case was not supplied with clothes by his father's tailor, as the de-

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defendant was in the case of *Story v. Pery*; and in the present case, the defendant not only seeks to defend himself, by shewing that he had clothes from many different tailors, a fact of which the plaintiff could know nothing; but he also seeks to avail himself of the amount of Messrs. Stultz's bill, though he defended an action upon it; and instead of paying Messrs. Stultz one farthing, he made them pay his costs of the defence of the action.

ALDERSON, B., (in summing up).—If you are of opinion that these goods, which were supplied by the plaintiff, were suitable to the condition in life of the defendant, and that the sums of 216*l.* and 200*l.*, which had been paid are not sufficient payments, the plaintiff is entitled to a verdict. I have looked at the bill of 216*l.* which the defendant's father has paid; that bill certainly contains no extravagant items, but still it includes between 70*l.* and 80*l.* worth of clothes delivered within the period in question, exclusive of military dress. However, the real question is, how much of this bill is for necessaries suitable to the defendant's station and degree? The defendant is the second son of an opulent gentleman who lives in St. James's Square; and in the bill that is the subject of the present action, he is charged for clothes supplied to him between the 19th of October, 1829, and the end of July, 1830, to the amount of 421*l.* Some of the articles are clearly not necessaries. There is a racing jacket charged for. That cannot be suitable to any degree, except that of a jockey; and if that were to be considered a necessary for a young gentleman, it will next be said that gambling is necessary for him. Eleven guineas for a waistcoat! Can that be considered necessary in any station of life, so as to charge a minor? If a person of full age orders these extravagant things, he must pay for them. If a person of full age chose to be extravagant enough, and absurd enough, to order a coat to be made of gold, and it was made for him and delivered to him, beyond all question he must pay for it; but, with respect to

minors, the law is otherwise. In the present case you must consider, not only whether the articles supplied by the plaintiff were in point of quality suitable to the defendant's station and degree, but, if so, was the quantity suitable or not? It may be proper for a young' man to have one thing of a sort, but not fifty; and the quantity is as much matter for your consideration as the quality. With a view to the quantity, and the quantity only, you may look at the bills of the other tradesmen by whom the defendant was also supplied; for, if another tradesman had supplied the defendant with ten coats, he would not then want any more, and any further supply would be unnecessary. So, if the defendant had had ten pairs of trousers from another tailor, and just after that the plaintiff supplied him with another pair, that other pair would not be necessary, and the plaintiff would not be entitled to be paid for it. A tradesman who deals with a minor must look to himself, and take care of himself. With a man of full age it is matter of contract; and if, as I have already said, a man of full age orders a coat to be made of gold, he must pay for it; but not so with a minor. If a minor is supplied, no matter from what quarter, with necessities suitable to his estate and degree, a tradesman cannot recover for any further supply made to the minor just after. You will take the plaintiff's bill, and strike out every item that is not necessary; and then, if the total of the items remaining do not exceed the amount already paid, you will return a verdict for the defendant. If they do exceed that amount, you will give your verdict for the plaintiff for the sum by which the amount is so exceeded.

Verdict for the defendant.

Erle, and *Jardine*, for the plaintiff.

Follett, *Bere*, and *Ball*, for the defendant.

[Attornies—*Boydell*, and *Brooksbank & Co.*]

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BEFORE MR. BARON PARKER.

Dec. 11th.

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A. brought an action on the case against the Bank of England, with whom he kept a banking account, for dishonouring, when presented for payment, a bill of exchange he had made payable at the Bank, and laid as special damage, that C., in consequence of this dishonour of the bill, declined to deal with him. The defendants pleaded, that, at the time of presentment for payment, they had not had sufficient funds in their hands a reasonable time, so as to enable their clerks to know of such

sum being in their hands:—Held, that if the bill was left at the Bank at nine o'clock and called for again at eleven when it was dishonoured, it must be considered as continuing in a course of presentment till eleven; and that, if the Bank had funds at a reasonable time before eleven and did not pay, they were liable in this action.

A banker is not bound to pay after banking hours a bill which is accepted payable at his house. The presentment in the evening by the notary's clerk is not a presentment for payment.

Where special damage is alleged, that C. declined to deal with the plaintiff, because his bill was dishonoured, the letter C. received, announcing to him the dishonour of the bill, may be read in evidence to shew that he received such a letter, but is no proof of the statements contained in it:—Held, also, that C. might be asked questions to shew that other causes in addition to the letter induced him to cease from dealing with the plaintiff; and that other witnesses might be asked whether other bills of the plaintiff's had not been dishonoured, but that they could not be asked as to any particular bill without its being produced.

CASE.—The declaration stated, that the plaintiff was a corn and flour factor, and that Messrs. Cooke & Gambling sent flour to him to sell on commission and for reward; that the defendants were bankers, and employed by the plaintiff as such, upon, amongst others, the terms following, to wit, that the defendants “would honour and pay for and on behalf and on account of the said plaintiff, out of any cash balance of and payable to the said plaintiff that might be in the hands of the said defendants as such bankers as aforesaid, any bill or bills of exchange which might be accepted by the plaintiff payable at the Bank of England, upon the same being duly presented for payment there by the person or persons respectively being entitled to the same and to receive the money therein mentioned; notice having been left by or on behalf of the plaintiff at the Drawing Office of the Bank of England aforesaid for the payment thereof previously to the same becoming due (a), such cash balance being sufficient for that purpose over and above any claim or lien of the said

(a) This notice is required by the Bank in the printed table of terms on which they deal with their customers who keep cash with them; but is not, we believe, required by any other bankers.

defendants thereon, and independently of any right which the said defendants might have to retain the same or any part thereof in their hands, and such cash balance having been in their hands a sufficient and reasonable time to enable them and their clerks and servants to know of the same being in the hands of the said defendants, and that the same was sufficient for the purpose of paying such bill or bills over and above the claim or lien of the said defendants thereon, and independently of any right that the said defendants might have to retain the same or any part thereof in their hands." The declaration then stated, that, a bill of exchange had been drawn by Cooke & Gambling on the plaintiff, dated December 15th, 1832, for 425*l.*, payable to S. Bignold, or his order, six weeks after date, which bill was indorsed by Messrs. Masterman, and accepted by the plaintiff payable at the Bank of England, and that when the bill became due it was *presented* at the Bank of England *for payment*, yet the defendants, not regarding their duty as such bankers, nor the terms upon which they were employed by the plaintiff as aforesaid, but contriving &c., " did not, when the bill of exchange was presented to them, *honour or pay the said bill, and refused to pay the same*, and although the said defendants then had in their hands, as such bankers as aforesaid, a cash balance of and payable to the said plaintiff, amounting to a large sum of money, to wit, 426*l.* 13*s.* 8*d.*, which was then and there sufficient for the purpose of paying the said bill, over and above any claim or lien of the said defendants upon the said last-mentioned sum of money, and independently of any right which the said defendants had to retain the same or any part thereof in their hands, and although such cash balance had then been in the hands of the said defendants a sufficient and reasonable time to enable them and their clerks and servants to know that the said defendants then had the same in their hands, and that the same was sufficient to pay the said bill over and above any claim or lien that the said defendants then

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had on the said sum of money, and independently of any right which the defendants had to retain the same or any part thereof in their hands, and although notice had theretofore, to wit, on the 1st of January, 1833, been left by and on the behalf of the said plaintiff at the Drawing Office of the Bank of England aforesaid, for the payment of the said bill, for a reasonable time previously to the same becoming due; by means and in consequence of which, notice of dishonour was given of the bill, and the plaintiff injured in his credit. The declaration then went on to state special damage, that Cooke & Gambling did not deal with the plaintiff and trust him as they otherwise would.

Pleas—*First*, “that, at the time when the said bill of exchange in the said declaration mentioned was presented and shewn to the said defendants for *payment thereof*; they the said defendants had not in their hands a cash balance of and payable to the said plaintiff sufficient for the purpose of paying the said bill of exchange in the said declaration mentioned, in manner and form as the said plaintiff hath above in his declaration in that behalf alleged; and of this the said defendants put themselves upon the country, &c.”

Second, “that, at the time when the said bill of exchange in the said declaration mentioned was presented and shewn to them the said defendants *for payment thereof*, the said supposed cash balance in the said declaration mentioned had not been in their hands a sufficient and reasonable time to enable them and their clerks and servants to know of the same being in the hands of the said defendants, and that the same was sufficient for the purpose of paying the said bill of exchange; and of this the said defendants put themselves upon the country, &c.”

On the part of the plaintiff, Mr. Cooke of the firm of Cooke & Gambling was called. He stated that the plaintiff had been a corn and flour factor, and that their firm

had consigned goods to him, and ceased to do so in consequence of a letter they received from Mr. Nimmo, which stated that the plaintiff's acceptance for 425*l.* (the bill mentioned in the declaration) had been dishonoured and not paid till the next day.

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Maule, for the defendant, objected that this letter was not evidence.

PARKE, B.—It is evidence of notice to this witness; but is not evidence of the facts stated in it.

In cross-examination of the witness *Cooke*, *F. Pollock* put questions as to the state of the plaintiff's credit at the time of the receipt of the letter.

Thesiger, for the plaintiff, objected.

PARKE, B.—Mr. *Pollock* may cross-examine with a view of shewing that other causes besides the letter operated in stopping the dealings.

F. Pollock.—I do not deny that this letter was the immediate cause of the stopping of the dealings; but there were other reasons which prevented a renewal of the dealings.

PARKE, B.—I think that you may ask that.

The witness stated, that the plaintiff had after this time stopped payment, and paid a composition on his debts; and that the witness's father-in-law advised him not to deal again with the plaintiff.

To prove the state of the plaintiff's account on the 29th of January, 1833, the day on which the bill mentioned in the declaration was dishonoured, the plaintiff's pass-book with the Bank of England was put in. By this it appeared, that, on the evening of the 28th of January,

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the plaintiff's cash balance was 33*l.* 13*s.* 8*d.*, and that in the afternoon of that day a check for 200*l.* was paid in and entered short, but was cashed the following morning. It also appeared, that, on the 29th, cash to the amount of 195*l.* was paid in to the plaintiff's credit. It was proved that the check for 200*l.* was cashed at half past nine o'clock on the morning of the 29th of January; and to fix the hour at which the cash was paid in, a witness named Penfold was called, who stated that he saw the plaintiff paying in cash at a little after 10 o'clock on the morning of the 29th, and that both he and the plaintiff left the Bank together.

To prove the dishonour of the bill mentioned in the declaration, Mr. Gard, a clerk of Messrs. Masterman, was called. He said—"I presented this bill at the Bank on the morning of the 28th; I presented it at a quarter past nine, and left it; I called again at 11 o'clock on the same morning, and the answer was—'Not sufficient effects.' The notary has dishonoured bills at six o'clock in the evening to present." In his cross-examination, he said—"We never pay after five o'clock, nor does the Bank; but we have a person who answers the notary in the evening. I received the bill back at 11 o'clock in the morning as a dishonoured bill. The person who answers the notary gives the same answer which was given in the morning."

F. Pollock.—Was this the first time that Mr. Whitaker's credit had been affected by the dishonour of a bill?

Theisiger, for the plaintiff.—Any other bill must be produced.

PARKE, B.—The witness cannot speak of a bill without producing it.

F. Pollock withdrew the question, and asked—Had other dishonoured bills of Mr. Whitaker passed through your hands.

Thesiger objected.

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PARKE, B.—That general question may be asked, as it does not refer to the contents of any particular bill.

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The question was put.

This witness further stated, that if a bill was dishonoured in the morning, and funds came to meet it in the course of the day, the clerk, who sees the notary in the evening, would state that fact and mark the bill with his initials, and it would be paid on the next day.

It was proved by Mr. Peel, another clerk of Messrs. Masterman, that, on the morning of the 30th of January, he received a message from the Bank of England, in consequence of which the bill was sent to the Bank, who paid it, and also 1s. 6d. for the noting. This witness also stated, that, if he had dishonoured a bill in the morning, and funds came in during the course of the day to meet it, he should immediately send to the holder, and take up the bill.

Mr. Nimmo was called, on the part of the plaintiff, to produce a letter, dated January 30, 1833; he handed it in, but was not sworn.

Thesiger, for the plaintiff, wished to look at the letter before it was put in.

F. Pollock.—A party, who calls for a letter, has no right to see it; and if, when he does see it, he finds it does not suit him, to return it.

PARKE, B.—Mr. *Thesiger* may look it over, to see if it is the letter he calls for.

Thesiger, having looked at it, put it in.

It was a letter from Mr. Peel to Mr. Nimmo; and in it,

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under a heading "Bills returned," had been written the words and figures—

"Whitaker, 425*l.* 1*s.* 6*d.*—answer 'Not sufficient;'" but the words "answer not sufficient" were scratched through with a pen, and a mark put above them, referring to a note at the bottom—"since taken up."

It was proved by a clerk of a notary, that he presented the bill at the Bank on the evening of the 29th of January, at half-past six o'clock, and that the clerk there said that there were not sufficient effects.

F. Pollock.—The plaintiff complains in his declaration of the refusal of the bill in the morning.

PARKE, B.—One important question will be as to what was the time at which the bill was presented. Was it presented at a quarter past nine, or later?

F. Pollock cited the case of *Marzetti v. Williams* (a).

PARKE, B.—If this cash was paid in at ten o'clock, or a little after, the question of reasonable time will be for the consideration of the jury.

F. Pollock addressed the jury, and opened that he should prove that the sum of 195*l.* was not paid in till twelve o'clock on the 29th of January; and that when, at eleven o'clock, the answer, "not sufficient effects," was returned, the Bank of England had not, in fact, sufficient effects of the plaintiff to enable them to take up this bill.

Thesiger.—I do not abandon the presentment by the notary.

(a) 1 B. & Ad. 415.

PARKE, B.—I think that your pleadings do not allow you to go into that.

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For the defendants several clerks and officers of the Bank were called, and, from their evidence, it appeared that the account of every customer, who has a right to draw checks on the Bank, or to accept bills payable there, is kept in two duplicate ledgers; and that, if any one pays in money to the credit of a customer's account, that money is put in one of certain drawers, which are cleared every quarter of an hour by clerks, who make entries of the sums in cash books, these entries being posted into the ledgers every quarter of an hour or twenty minutes. They also stated, that their habit was always, before dishonouring a bill, to examine the cash books and drawers, and also to send to the Bill Office, to inquire if any check had been paid in to the credit of the customer, which had not been already posted in the ledgers; and also to inquire twice of the clerks in the Drawing Office, to know if any money had been paid in—the last inquiry being immediately before the answer is given to the person who has presented the bill. It was proved by two of the clerks of the Drawing Office of the Bank, that, from the circumstance of the time at which they relieved each other on the 29th of January, they were certain that the sum of 195*l.* must have been paid in by the plaintiff after twelve o'clock on that day.

PARKE, B. (in summing up).—The plaintiff has in this case stated in his declaration that he had employed the Bank of England as bankers, on the terms that they “would honour and pay for and on behalf and on account of the said plaintiff, out of any cash balance of and payable to the said plaintiff, that might be in the hands of the said defendants, as such bankers as aforesaid, any bill or bills of exchange which might be accepted by the plaintiff payable at the Bank of England, upon the same being

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duly presented there for payment thereof, by the person or persons respectively being entitled to the same, and to receive the money thereip mentioned, notice having been left by or on behalf of the plaintiff at the Drawing Office of the Bank of England aforesaid, for the payment thereof, previously to the same becoming due, such cash balance being sufficient for that purpose, over and above any claim or lien of the said defendants thereon, and independently of any right which the said defendants might have to retain the same, or any part thereof, in their hands; and such cash balance having been in their hands a sufficient and reasonable time, to enable them and their clerks and servants to know of the same being in the hands of the said defendants, and that the same was sufficient for the purpose of paying such bill or bills, over and above the claim or lien of the said defendants thereon, and independently of any right that the said defendants might have to retain the same, or any part thereof, in their hands." The plaintiff, by this statement in his declaration, describes the duty of the Bank of England, as bankers, with perfect correctness. The declaration then states the presentment of the bill in question. However, a presentment of a bill at a banker's for payment means a presentment within the hours of business. The declaration then goes on to allege that the defendants had a sufficient sum in their hands such a reasonable time before the presentment of the bill, as to enable the defendants' servants to know it, but that they, contrary to their duty, dishonoured the bill. The defendants, by their plea, only deny two things—they first say, that they had no sufficient funds at the time of the presentment of the bill; and, secondly, that they had not sufficient funds a reasonable time before the bill was presented. You will, therefore, have to say whether there was, at the time of the presentment of the bill, a sufficient sum in the hands of the defendants to enable them to pay this bill; and if so, whether it had been in their hands a reasonable time for

their servants to know it. It is proved, that the bill was left by the clerk of Messrs. Masterman, at half-past nine o'clock, on the 29th of January; but I am of opinion that that is not to be considered as the time of the presentment of the bill, and that the bill is to be considered as in a course of presentment till it was returned with the answer to Messrs. Masterman's clerk. We must, therefore, take it as having been presented at eleven o'clock. Now, had the Bank sufficient funds in their hands at eleven o'clock, and at a reasonable time before? It is true, that this bill was presented after banking hours by the notary; but I am of opinion, that, as between banker and customer, the banker was not bound to pay after five o'clock. As between holder and acceptor, the acceptor may pay by going to the holder at any part of the day, although he has refused payment in the morning. It has been said, that a private banker, if funds came in during the course of the day, would either send a message, or the clerk in the evening would tell the notary that there were funds, and the bill would be paid next day. This the Bank did not do; but what would be the difference? Here the bankers wrote on the next day to the country, saying, that there were not sufficient effects; but, before their letter goes to the post, they make a note, stating that the bill had been taken up, and, this being sent to the Norwich Bank, Mr. Nimmo writes, and informs Messrs. Cooke & Gambling that the bill was dishonoured and not paid till next day; and the whole mischief arose from the letter stating that the bill was not paid till the day after, which would have been just the same if there had been an answer given to the notary that funds had come in. The real question is, whether the plaintiff had a sufficient balance at the Bank, at a reasonable time before eleven o'clock, on the 29th of January? It is clear that he had his balance of the evening before, and also that he had credit for the 200*l.* check before that hour; and

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the most material point in dispute is as to the time at which the sum of 195*l.* was paid in. Mr. Penfold states that to have been earlier than ten minutes past ten. The defendants' witnesses say, that it could not have occurred till near twelve o'clock, and certainly not till after eleven. They state, that they always inquire whether money has been paid in since the commencement of the day, if the amount in the ledger is not sufficient: they state, too, that they also inquire at the Bill Office to know if any bills are come in, and of all the clerks at the Drawing Office to ascertain if any money has been paid there; and that this is always done before a bill is dishonoured; and that, if any such bills or credits have come in to sufficient amount, the bill is honoured, although there has not been time to enter those credits into the ledger. The plaintiff must not only shew that he had funds sufficient in the hands of the Bank, but that they were there sufficiently early to have been known to the principal person at the Drawing Office at eleven o'clock. It has been said, that the defendants have given judgment against themselves, by paying 1*s.* 6*d.* for the noting of the bill. However, that payment may be referred to the omission to inform the notary that the bill would be paid next day; because, if the notary had been told that the bill would be paid next day, he would not have noted it. The simple question is, whether the plaintiff had sufficient funds at the Bank a reasonable time before eleven o'clock? If he had, he is entitled to recover in this action; but the issue lies upon him to prove to your satisfaction that such was the case.

Verdict for the defendants.

Thesiger, Platt, and Rawlinson, for the plaintiff.

F. Pollock, Maule, and Follett, for the defendants.

[Attornies—*Miller & Dyson*, and *Freshfield*.]

IN the ensuing term, *Thesiger* applied for a new trial, on the grounds that the Bank of England ought to have paid the bill when it was presented by the notary in the evening, or at least to have informed him that they had sufficient funds; and also, that the verdict was against the weight of evidence.

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LORD ABINGER, C. B.—All that bankers contract for is to pay the bills of their customers within banking hours, which are between nine in the morning and five in the evening. A presentment after five o'clock is not for payment but to charge the drawer, and is for the purpose of protesting the bill. With respect to the paying in of the 195*l*., there was evidence on both sides; I am of opinion that that on the part of the defendants preponderated. However, at all events that was a question for the jury, and they have decided upon it. With respect to the point, whether the Bank should give notice to the holder of the bill when they receive assets during the day, we think that that is not raised by the pleadings. Under these circumstances, I see no sufficient ground for disturbing the verdict.

The other learned Barons concurred.

Rule refused.

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Adjourned Sittings in London after Michaelmas Term, 1834.

BEFORE MR. BARON PARKE.

Dec. 15th.

If a sheriff take goods in execution after an act of bankruptcy, and sell them, the jury, in an action of trover by the assignees, may allow to the sheriff the expenses of the sale, if they think the assignees must have sold the goods if they had not been sold by the sheriff; but this is matter for the jury.

If a replication conclude to the country with an "&c.," and no *similiter* be added, the Judge will try the cause, as the "&c." is sufficient.

CLARK and Another, Assignees of SUTTON, a Bankrupt,
v. NICHOLSON, Esq.

TROVER for goods.—Plea, that the plaintiffs ought not further to maintain their action against the defendant, because he brings into Court 24*l.* 15*s.*; and the plaintiffs have not sustained damage to a greater amount (a). Replication, that the plaintiffs have sustained damages to a greater amount; "and this, the plaintiffs, assignees as

(a) As the forms of the plea and replication are not to be found in any of the printed collections, we have subjoined them:—

"The 30th day of October, in the year of our Lord, 1834.

"The defendant, by Frederick John Manning, his attorney, says, that the plaintiffs, as assignees as aforesaid, ought not further to maintain their aforesaid action, because the defendant now brings into Court the sum of 24*l.* 15*s.* ready to be paid to the plaintiffs as assignees as aforesaid; and the defendant further says, that the plaintiffs, as assignees as aforesaid, have not sustained damages to a greater amount than the said sum of 24*l.* 15*s.* in respect of the cause of action in the declaration mentioned, and this he is ready to verify; wherefore he prays judgment if

the plaintiffs, as assignees as aforesaid, ought further to maintain their action, &c."

Replication.—"The 1st day of November, in the year of our Lord, 1834.

"The plaintiffs, assignees as aforesaid, say, that they ought not, by reason of any thing by the defendant in his said plea, to be barred from further maintaining their aforesaid action against the defendant, because they say that the plaintiffs, as assignees as aforesaid, have sustained damage in respect of the cause of action in the declaration mentioned to a greater amount than the said sum of 24*l.* 15*s.*, so paid into Court as aforesaid; and this the plaintiffs, assignees as aforesaid, pray may be inquired of by the country, &c."

aforesaid, pray may be inquired of by the country, &c." There was no *similiter*, and the record went on—"Therefore the sheriffs were commanded that they cause to come here on the — day of — twelve, &c."

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Bompas, Serjt., for the defendant.—There is no issue joined in this case; there is no *similiter*.

PARKE, B.—As there is an "&c." that will do. I think you may go on.

R. V. Richards, for the plaintiffs.—I hope, to avoid dispute hereafter, that your Lordship will allow us to amend, by adding the words, "and the said defendant doth the like."

PARKE, B.—The "&c." will do.

Bompas, Serjt., cited the case of *Bent v. Benyon* (a).

PARKE, B.—That case is very different from the present. In the present case is there any *similiter* in the issue delivered?

Bompas, Serjt.—No, my Lord.

R. V. Richards.—They accepted the issue, and did not return it, as they ought to have done.

Bompas, Serjt.—The issue being delivered in this way, we could not move for judgment as in case of a nonsuit. That was held in the case of *Brown v. Kennedy* (b).

PARKE, B.—The question is, whether any amendment

(a) Ante, p. 217. See also the ante, p. 551.
case of *Rowlinson v. Roantree*, (b) 2 Dowl. Pr. Ca. 639.

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is necessary. I think that the best way will be not to amend, as it cannot be shewn that there was any *similiter* in the issue; but I will try the case, because I think that the "&c." is sufficient.

It appeared that the defendant was the sheriff of Surrey, and that he had levied on the goods of the bankrupt Sutton under a writ of *feri facias*, after an act of bankruptcy committed by Sutton. The defendant, as sheriff, had sold the goods; and the amount paid into Court was the amount of the proceeds of that sale, after deducting the expenses of the sale itself, but not deducting any thing for sheriff's poundage, &c.

R. V. Richards.—I submit, that, as the goods belonged to the assignees, they are entitled to the full value of them, without any deduction whatever.

PARKE, B. (to the jury).—If you think that the assignees must have themselves sold the goods, if they had not been taken by the sheriff, they must then have been put to the expenses of the sale; and that being so, you may, if you think proper, allow those expenses to the sheriff.

Verdict for the defendant.

R. V. Richards, and *Wilson*, for the plaintiffs.

Bompas, Serjt., for the defendant.

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[Attornies—*M. Thompson*, and *Manning & Son*.]

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Jan. 13th.

BEFORE LORD ABINGER, C. B., MR. BARON PARKE, MR. BARON ALDERSON, AND MR. BARON GURNEY.

R. V. Richards applied for a rule to shew cause why the verdict should not be entered for the plaintiff for

6*l* 5*s.*, the expenses of the sale, or why there should not be a new trial, on the ground that the learned Baron should have directed the jury not to allow the sheriff the expenses of the sale.

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LORD ABINGER, C. B.—You cannot apply to alter the verdict, unless the learned Baron gave you leave to move.

R. V. Richards.—There was no leave given.

LORD ABINGER, C. B.—The general practice in these cases has been for the jury to fix the amount of damages, by taking the value of the goods, and deducting those payments which the assignees must have made.

R. V. Richards.—Under the old rules of pleading, this was a matter of little consequence; but it now involves the whole costs of the cause.

LORD ABINGER, C. B.—It was a question for the jury, and they thought the assignees must have been put to the expense of a sale.

R. V. Richards.—Suppose that a party had goods in three counties. Are the assignees to be charged with the expense of three distinct sales?

ALDERSON, B.—What have you lost in this case? If you had had the goods, you must have sold them, and would have got the net proceeds, and that is what you have now.

GURNEY, B.—I recollect, that, in one case, the parties notified to the sheriff that they had an opportunity of selling by private contract, and, notwithstanding that, the execution creditor sold, and there the jury would not

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allow the expenses of the sale; but you did not give any evidence.

R. V. Richards.—In the case of *Glasspoole v. Young (a)*, where a man and woman had married and were living together, but it was afterwards discovered that the marriage was void, as the man had another wife living, the sheriff, who had seized the goods of the woman under an execution against the man, had a verdict against him for the full value of the goods, though it exceeded the price for which they were sold; and the Court of King's Bench would not disturb the verdict.

GURNEY, B.—There the plaintiff never meant to sell at all.

R. V. Richards.—I submit, that the plaintiffs are entitled to the full value of the goods, without any deduction.

LORD ABINGER, C. B.—We do not lay it down as matter of law in any case; but we say that the jury are entitled to make these deductions, if they think them fair. If goods had been sold in three counties, that would be matter of evidence.

Rule refused.

(a) 4 M. & R. 533.

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Dec. 16th.

HOMAN v. THOMPSON.

ASSUMPSIT by the plaintiff, as the payee, against the defendant, as the maker of a promissory note, dated the 1st of March, 1834, for 20*l.*, payable one month after date. There were also two counts for money lent, and on an account stated. Plea, *first*, to the first count—that the defendant had not any consideration or value for making the note; *second*, to the other counts—non assumpsit. Replication—that the defendant had value, to wit, 20*l.* (a).

Erle, for the plaintiff, claimed the right to begin, on the ground that the affirmative was on the plaintiff; and he cited a case tried before Mr. Baron *Gurney*, in which that learned Baron allowed the plaintiff to begin, and to put in the bill, and then leave it to the defendant to impeach the consideration (b).

PARKE, B.—As the bill is admitted, I think the defendant ought to begin. I held yesterday, that, if no evidence is intended to be given, on the part of the plaintiff, on the money counts, the general issue pleaded to those counts will not entitle the plaintiff to begin, as the object of an opening is to put the jury in possession of

It was agreed between the plaintiff, the defendant, and H., that the defendant should make his note for 20*l.*, and that the plaintiff should draw on his banker for 20*l.*, and pay in this note, and the plaintiff was to have 7*l.* 12*s.*, and the two others 6*l.* 4*s.* each. The money was thus procured, and the defendant, not wanting his 6*l.* 4*s.*, let H. have it. It was at first agreed, that, when the note became due, they should contribute their respective shares to meet it; but H. told plaintiff afterwards, that he would provide 12*l.* 8*s.* towards it:—Held, that, if the defendant gave this note for the accom-

modation of the plaintiff and H., the plaintiff would not be entitled to recover on it; but that, if the plaintiff was to advance 20*l.*, and receive 7*l.* 12*s.* as a gift, the plaintiff could recover the whole of the 20*l.* on the note:—Held, also, that, if the defendant was to be only security for 12*l.* 8*s.*, he would be liable only to that amount; and that, if each was to repay his own share, the plaintiff could only recover 6*l.* 4*s.* from the defendant, and that H. saying afterwards that he would pay 12*l.* 8*s.* would make no difference, unless the plaintiff then made a new bargain to release the defendant from liability altogether.

On an issue whether consideration was given by the plaintiff for a note, the letters of the plaintiff, shewing that he was pressed for money, are evidence for the defendant.

If a witness on the *voir dire* be asked whether he is liable to pay the attorney, and he say that he is not, a letter written by him may be put into his hand, and, after he has looked at it, the question may be put again.

(a) As to this form of pleading see the case of *Easton v. Pratchett*, post, p. 736.

(b) The case of *Barnard v. Weekes*, executor of *Weekes*, tried at Westminster, Dec. 12, 1834.

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the facts you mean to prove by your witnesses. My own impression is, that the defendant should begin; but, as my brother *Gurney* held otherwise, I shall act on that precedent in this instance, and consider of the matter, with a view of laying down some general rule (a).

Erle, for the plaintiff, put in the note.

Barstow, for the defendant, addressed the jury; and, to prove the want of consideration, he called Mr. Howell, the brother-in-law of the plaintiff.

This witness was examined on the *voire dire*; and he stated that he was not liable to pay the costs of the defence in this action.

Erle, for the plaintiff, proposed to put a letter into the hand of the witness, which he had written to the plaintiff's wife.

Barstow.—Is not this going beyond an examination on the *voire dire*?

PARKE, B.—You may shew the letter to the witness, and then ask him if he is liable to the attorney.

The witness, having looked at the letter, said that he was not liable.

Two letters of the plaintiff, written to this witness, were put in, with a view of shewing that the plaintiff was pressed for money about the time when the note was given. One of them stated that he was in want of a sum of 3*l.* 13*s.* 11*d.* to pay poor's rate; and the other stated that

(a) See the case of *Mills v. Oddy*, post, p. 728.

he could not pay Saunders, whom the witness stated to be the plaintiff's landlord.

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Erle, for the plaintiff.—I submit that these letters are not evidence. The question is, whether the plaintiff gave consideration for this particular bill.

PARKE, B.—I think they are relevant to the issue, and that I must receive them.

The witness Howell stated, that, previously to the 1st of March, he had promised the plaintiff an advance of 7*l.* 12*s.*; and that, on that day, the plaintiff asked him to get the defendant to give him a note to enable him to get 7*l.* 12*s.* to pay his rent. The defendant consented to do so, and the present note was made; and the plaintiff said that he could draw on money at Messrs. Hopkinson's, of which he was a trustee; but that, if this note was paid in, he should keep the balance, though he drew a check for 20*l.* The plaintiff drew the check, which was cashed, and this note was paid in to the plaintiff's credit at Messrs. Hopkinson's.

In cross-examination this witness said, that the defendant, when he made the note, said, that he wanted money for his own accommodation; and it was agreed by the plaintiff, the defendant, and the witness, that, after the plaintiff had received 7*l.* 12*s.*, the witness and the defendant should divide the residue of the 20*l.* between them. The witness further stated, that he paid in the note at Messrs. Hopkinson's, and got cash there for the plaintiff's check for 20*l.*, of which he paid 7*l.* 12*s.* to the plaintiff; but, the defendant having received some other money, the witness kept the defendant's share and his own too; that it was then agreed that the plaintiff should pay 7*l.* 12*s.* towards meeting the note, and the witness and the defendant 6*l.* 4*s.* each; but, on the witness and the plaintiff meeting on the day after, it was agreed between them that the plaintiff

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should give the witness 7*l.* 12*s.*, and that the witness should take up the note.

PARKE, B. (in summing up).—It is quite clear that 20*l.* has come out of the pocket of the plaintiff, and that the defendant has had no part of the money; and if the defendant subscribed this note partly for the plaintiff's accommodation, and partly for that of the witness Howell, the plaintiff cannot recover. If the plaintiff was to advance 20*l.* on the credit of the defendant, and the plaintiff was to have 7*l.* 12*s.* as a gift for so doing, the plaintiff will be entitled to recover the whole amount of the note; but if you think that the defendant was only to be security to the plaintiff for the sum of 12*l.* 8*s.*, the plaintiff would be entitled to a verdict for that amount only. There is also another view of the case, which is this:—if the witness had arranged to advance 7*l.* 12*s.* to the plaintiff, and could not do it; but it was afterwards agreed that the plaintiff should have 7*l.* 12*s.*, and the two other parties 6*l.* 4*s.* each, the defendant would be liable to the amount of 6*l.* 4*s.* This certainly seems to have been the agreement at first, and, though the plaintiff and witness met next day, and the witness said he would pay the whole 12*l.* 8*s.*, that would not alter the liability of the defendant on the original agreement when the note was made, unless you think that there was an agreement by the plaintiff afterwards to release the defendant from paying any share at all. You will first consider whether the 20*l.* was advanced by the plaintiff to the witness Howell, the defendant being the surety; if so, the plaintiff may recover the whole amount, though he received 7*l.* 12*s.* as a gift. But, if you think the defendant was to be surety to the plaintiff for 12*l.* 8*s.* only, your verdict must be for that sum; or if, by the original agreement, each of the three was to provide for his own share, the plaintiff will be entitled to recover 6*l.* 4*s.*, although the defendant did not, in fact, get any part of that 6*l.* 4*s.*, unless the plaintiff agreed to release the defendant

from that bargain, and made a new arrangement; as in that case the defendant would be entitled to a verdict. If you think that was so, I wish you to tell me that such is the view you take of the matter, as I have some doubt whether the defendant may be able to avail himself of that defence under this plea.

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Verdict for the plaintiff—Damages, 12*l.* 8*s.*

Erle, for the plaintiff, applied for a certificate that this was a proper cause to be tried in this Court, which was granted by the learned Baron.

Erle, and *Petersdorff*, for the plaintiff.

Barstow, for the defendant.

[Attornies—*Torkington*, and *Austen*.]

SMART v. RAYNER.

Dec. 16th.

ASSUMPSIT on a bill of exchange, dated 12th August, 1831, drawn by Aaron Sillito on the defendant, payable three months after date to the drawer or his order, for 14*l.* 16*s.*, accepted by the defendant, and indorsed to the plaintiff. *Second* count, on a bill drawn 12th October, 1831, by A. Sillito on defendant, payable one month after date to the drawer's order, for 12*l.* 17*s.*, accepted by defendant, and indorsed to the plaintiff. *Third* count, on an account stated.

If in assumpsit on bills of exchange, with a count upon an account stated, the defendant plead payment to the counts on the bills, and non assumpsit to the account stated:—Held, that the defendant is entitled to begin, unless the plaintiff's counsel have some evidence to give on the count upon an account stated.

Pleas.—*First*, to the first count, that, on the 1st of January, 1834, one Aaron Sillito paid the plaintiff the said sum in the said bill mentioned, in full satisfaction of the said bill, and all damages, &c., and plaintiff accepted the same. *Second* plea, a similar plea to the second count. *Third* plea to the third count, non assumpsit. Replication—traversing the first and second plea.

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R. V. Richards, for the plaintiff.—I submit, that, as there is the general issue pleaded to the count on an account stated, I am entitled to begin.

PARKE, B.—Have you any evidence to give upon the account stated? If you have not, the defendant must begin; and the only object of an opening is to state to the jury the evidence that you propose to adduce. If you have no evidence but the bills, the defendant must begin.

R. V. Richards.—As this is an action against the acceptor, a very little more evidence than the bills would entitle the plaintiff to recover on the account stated.

PARKE, B.—Have you any other evidence on the account stated except the bills?

R. V. Richards.—No, my Lord.

PARKE, B.—The defendant must begin.

C. Cresswell, for the defendant, opened his case, and called witnesses.

Verdict for the plaintiff.

R. V. Richards, for the plaintiff.

C. Cresswell, for the defendant.

[Attornies—*D. Lay*, and *Watson & Sons*.]

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HOWELL v. JACKSON.

Dec. 18th.

FALSE imprisonment.—Pleas, *first*, Not Guilty. *Second*, that the defendant was possessed of a public-house, and that, at between the hours of 9 and 10 o'clock on the night of the 6th of November, 1833, the plaintiff was in the house, "and conducted himself in a riotous, quarrelsome, disorderly, and uncivil manner" to the defendant and his servants, and committed a breach of the peace therein; that the plaintiff was requested to depart, and refused to do so, whereupon the defendant, in defence of the possession of his house, gently laid his hands on the plaintiff to remove him; and because the said plaintiff then and there forcibly and violently resisted the said removal, and because the said defendant, from such resistance, was wholly unable to remove the said plaintiff, the said defendant gave charge of the said plaintiff to one S. B. Ward, a watchman, duly assigned to keep watch and ward in the parish and ward aforesaid, during the night of the said 6th of November, ("who then and there saw and had view of the said breach of the peace so committed by the plaintiff,") and requested the said watchman to remove the plaintiff; that the watchman gently laid his hands on the plaintiff to remove him, and take him before a justice of the peace; and it being at a late hour of the night, and an unreasonable time to take the plaintiff before such justice, the watchman took the plaintiff to a certain watchhouse, to appear before John Lloyd, the constable of the night there. That the constable of the night committed the plaintiff to Giltspur Street Compter. That the next morning the plaintiff was taken before the Right Hon. Sir Peter Laurie, Knt., then being Lord Mayor of London, and by him discharged. The *third* plea was similar, except that it omitted all that part of the former plea which related to those matters which were

If a person conducts himself in a disorderly manner in a public-house, and the landlord requests him to depart, and he refuse to do so, the landlord is justified in laying hands on him to put him out; and if, while the landlord has hold of him to put him out, the person lays hands on the landlord, this is an assault; and, if it is seen by a peace-officer, he is justified in taking the person into custody.

So, if a person, without committing any assault, make such noise or disturbance in a public-house as would create alarm, and disquiet the neighbourhood, and the persons passing along the adjacent street, this would be such a breach of the peace as would not only justify the landlord in turning the person out of the house, but would justify the landlord in immediately giving the person into the custody of a peace-officer, provided that this had occurred

in the presence of the officer.

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subsequent to the taking of the plaintiff to the constable of the night. Replication to the second and third pleas, *de injuriâ*.

On the part of the plaintiff, it was proved that the defendant, who kept the Hercules public-house in Leadenhall Street, gave the plaintiff into the charge of a watchman, who took him away in custody. The witnesses called on the part of the plaintiff stated that they did not see the plaintiff commit any disturbance.

For the defendant, Ward the watchman was called. He stated, that, on the evening of the 6th of November, he was on duty, and, in consequence of hearing a noise, he went into the defendant's public-house, where he found the plaintiff and five or six other young men "skylarking, bonneting, and kicking up a rumption; and there was a piece-of-work." This witness explained, that, by the term "bonneting," he meant that the persons were striking each other upon the hat, so as to drive the hat down over the face of the wearer. Of the terms "skylarking" and "rumption," he gave no explanation. This witness stated that he took the plaintiff by the collar, and led him out of the house, and took him for about fifteen yards along the street, when he let the plaintiff go, and the latter immediately said he would go back and have his revenge, and went in a direction towards the defendant's house. This witness further stated, that he went round his beat, and that, on his return to the neighbourhood of the defendant's house, he heard a person at the door of it cry "watch," and that he in consequence went in, and there found the plaintiff sitting down, whereupon the witness sprung his rattle, and the defendant tried to put the plaintiff out of the house, the plaintiff having hold of the defendant's collar to resist being put out; upon which the witness, with the assistance of another watchman named Griffith, took the plaintiff into custody, and took him to the watchhouse, from which he was sent to Giltspur Street Compter.

PARKE, B., (in summing up).—In order to make out this defence, and to substantiate the special pleas, you must be satisfied that the plaintiff had committed a breach of the peace, and that the watchman saw him do so. If a man comes into a public-house, and conducts himself in a disorderly manner, and the landlord requests him to go out, and he will not, the landlord may turn him out. There is no doubt that a landlord may turn out a person who is making a disturbance in a public-house, though such disturbance does not amount to a breach of the peace. To do this, the landlord may lay hands on him; and in so doing the landlord is not guilty of any breach of the peace. But if the person resists, and lays hands on the landlord, that is an unjustifiable assault upon the landlord; and, if the watchman in this case saw such an assault committed, that would make out the pleas. There might, it is true, be a sufficient breach of the peace to justify the defendant as the landlord of the house in giving the plaintiff into custody without this assault, and even if there was no assault at all. For if the plaintiff made such a noise and disturbance as would create alarm, and would disquiet the neighbourhood and the persons passing along the adjacent street, that would be such a breach of the peace as would not only authorize the landlord to turn the plaintiff out of the house, but it would also give the landlord a right to have the plaintiff taken into custody, if this occurred in the view of the watchman. The watchman, Ward, has said that he saw the piece-of-work, and what he calls bonneting, the first time he went into the house. Now, if the plaintiff and others were then conducting themselves in a manner calculated to disturb the neighbourhood, this would justify the watchman in turning the plaintiff out and in taking him into custody, if, on his going to the house the second time, he found the plaintiff still there. You will first consider whether the defendant had hold of the plaintiff, endeavouring to put him out; and whether the plaintiff laid hands on the de-

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defendant to resist that; for, if that were so, and the watchman saw it, that would make out the justification. But should you think that that is not made out, are you satisfied that there was on the first occasion such a disturbance, in which the plaintiff took part, as was calculated to disturb the neighbourhood, and that the watchman then saw it, as that would justify the watchman in taking the defendant into custody when he found him in the public-house on the second occasion, and, *à fortiori*, that would be so if the watchman saw the plaintiff still joining in such a disturbance as would amount to a breach of the peace; I mean on the second occasion, when the plaintiff was taken into custody.

Verdict for the defendant.

Thesiger, and *Moody*, for the plaintiff.

Andrews, Serjt., and *Butt*, for the defendant.

[Attornies—*R. Murphy*, and *R. M. Hill*.]

Dec. 18th.

HOLTUM v. LOTUN.

A. caused B. to be taken into custody on suspicion of felony, and taken before a magistrate, who remanded B. for two days, and then discharged him:—*Seemle*, that B., on a declaration for false imprisonment (in the usual form), cannot recover for the two days' imprisonment after the remand.

Whether he could do so if it were stated as special damage—*Quere?*

FALSE imprisonment.—The declaration was in the usual form. Plea—Not guilty.

It appeared that the defendant, who was a stage-coachman, had given the plaintiff in charge to a policeman, on suspicion of having stolen a box from the boot of his coach. The plaintiff was taken to the station-house and thence before a magistrate, who remanded him for two days, at the expiration of which time he was discharged.

PARKE, B., (in summing up).—I think that the defendant is not liable for the imprisonment subsequent to the time when the plaintiff was remanded by the magistrate, as

that was the act of the magistrate; but I will give the plaintiff's counsel leave to move to increase the damages, if, by your verdict, you will sever the damages prior and subsequent to the remand.

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Comyn, for the plaintiff.—The remand was at all events the consequence of the defendant's act, and the defendant is liable for all consequences of the wrongful act originally committed by him; and, if it were not so, the plaintiff would be without remedy, as no action will lie against the magistrate. It is, I submit, a special damage resulting from the original wrongful act of the defendant (*a*).

PARKE, B.—That is a nice question; but there is no such special damage stated in the declaration.

The jury found for the plaintiff, with 20% damages for the imprisonment before the remand.

Hill, for the plaintiff.—I shall certainly not move, as I am satisfied with the verdict.

Hill, and *Comyn*, for the plaintiff.

Thesiger, for the defendant.

[Attornies—*D. Wire*, and *Donaldson*.]

(*a*) See the case of *Scott v. Shepherd*, 3 Wils. 403.

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Dec. 19th.

MILLS v. ODDY.

A. had purchased at an auction an under-lessee's interest in a house, and refused to pay a check which he had given for the deposit, because the ground-rent payable to the superior landlord was greater than it was stated to be at the sale:—

Held, that the superior landlord's solicitor was not compellable to produce the counterpart of the original lease; and that a person who had advanced money on that lease, and held it as equitable mortgagee, could also not be compelled to produce the lease itself; but that, if both these, on being called as witnesses, refused to produce the lease and counterpart, secondary evidence might be

given of the contents of the lease, by calling any person who had seen it, and who neither claimed under it as one of his own title deeds, nor was privileged as an attorney or solicitor.

If a party has given a bill of exchange or check for the amount of a deposit on a sale by auction, any ground on which the party could recover back his deposit, if paid in money, will be a good ground of defence in an action upon the bill or check.

A party gave a check for the amount of a deposit on a sale by auction, which sale was void. In an action on the check, he pleaded that there was no consideration for the check; and the plaintiff replied, that there was consideration:—Held, that on this issue the defendant must begin.

Whether, on such a plea, the defendant can insist on the sale being void; and, whether, if he cannot, the Court would give judgment on the stat. 3 & 4 Will. 4, c. 42, s. 24.—*Quære?*

ASSUMPSIT on a check upon the Bank of England.—The *first* count of the declaration stated, that the defendant, on the 21st of August, 1834, made his draft or order in writing for the payment of money, commonly called a banker's check, and directed it to certain persons, by the style and description of the cashiers of the Bank of England, and thereby required them to pay the plaintiff or bearer 39*l.* 18*s.*, which check the defendant delivered to the plaintiff. It then averred presentment, and that the cashiers did not pay, &c. *Second* count, on an account stated. Plea, as to the first count of the declaration—"That there was not at any time any consideration or value for his the said defendant's making the said draft or order, or for paying the amount thereof, and this he the said defendant is ready to verify, &c.;" and, as to the second count, non-assumpsit. Replication to the plea pleaded to the first count, that, "at the time of making the said draft or order in the said declaration in that behalf mentioned, there was a good, valid, and sufficient consideration for the said defendant's making the said draft or order;" concluding to the country.

Thesiger, for the defendant, claimed the right to begin.

PARKE, B.—I have considered of this matter since the trial of the case of *Homan v. Thompson* (a), and I think

(a) Ante, p. 717.

that, on these pleadings, the defendant is entitled to begin.

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Thesiger, for the defendant, opened that this check had been paid as a deposit on the sale of a house in the Borough Road, which was sold by auction as subject to a ground-rent of 15*l.*; but that so far from this house being subject to a rent of 15*l.* only, it was one of *four* houses which were liable to a ground-rent of 35*l.* a year.

PARKE, B.—I think your case does not support your plea; you should have admitted that the check was drawn for value, but that you had a right to avoid the sale, on the ground of fraud; and that you did avoid it. The rules of pleading of H. T. 4 Will. 4, do not suggest a general form of plea of no consideration, and the instance put in the rule is that of an accommodation bill.

The particulars and conditions of the sale were put in, of which the following are extracts —“Particulars, with conditions of sale, of the valuable lease held under the City, for the long term of fifty-eight years, wanting ten days, from June, 1831, *at a low ground-rent*, of capital premises, consisting of an excellent brick-built dwelling-house, &c., which will be sold by auction by Mr. Mills, &c. These desirable premises are held under lease for the long term of fifty-eight years, wanting ten days, from the 24th day of June, 1831, *at a ground-rent of 15*l.* per annum.*” Then followed the conditions of sale, which were in the usual form, and contained among others the following:—“*Third*, that the purchaser should pay a deposit, and sign an agreement for payment of the remainder of the purchase-money on the 29th of September, 1834. *Fourth*, on payment of the remainder of the purchase-money according to the 3rd condition, the purchaser shall have an original lease of the property from Mr. George Henry Malme, who is under agreement to grant the same according to the draft

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to be produced at the time of the sale (a); the costs and charges of which lease and of a counterpart, to be executed by the purchaser, are to be borne and paid by the purchaser; and he is not to require the production of the lessor's title. *Lastly*, if any error or mistake shall be made in the particulars of the property above described, such error or mistake shall not annul the sale, but a compensation or equivalent shall be given or taken, as the case may require."

It was proved by Mr. Newman, the clerk of the auctioneer, that the plaintiff paid this check to him for the deposit on the sale. This witness stated, that it was usual for auctioneers to take the checks of "known good men;" and that the reason why this check was not cashed at the Bank was, that it was not written on one of the engraved forms supplied by the Bank to their customers, and which the Bank require to be used.

To shew the amount of ground-rent at which this house was held, Mr. Brand was called. He said—"I am the principal clerk in the office of the Comptroller of the Bridge-house estates. I have the counterpart of the lease of this house from the Corporation of the City of London to a person named Longmore. I decline producing it as it is a title-deed of the corporation."

Theisiger, for the defendant.—Is he not bound to produce it? Is it such a title-deed of the City as to enable him to decline producing it?

PARKE, B.—I think he is not bound to produce it.

Theisiger.—Mr. Brand, are you the attesting witness of this lease?

(a) No draft was produced, but from Mr. Malme to Mr. Sutton extracts of the draft of a lease were read at the sale.

Erle, for the plaintiff.—I must object to the witness being asked whether he is the attesting witness of a lease not produced.

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PARKE, B.—You may ask him, whether he attested the instrument which he has, and which he declines to produce.

It was admitted, that Mr. Brand had been subpoenaed to produce the counterpart of this lease.

Mr. Brand, in answer to further questions, said, “ I am an attorney ; the Comptroller of the Bridge-house estates is the attorney and solicitor of the Corporation in all matters relating to the Bridge-house estates.”

PARKE, B.—The attorney is not to produce his client's title-deeds, nor to disclose their contents ; and this witness is in fact in the same situation as the attorney. The comptroller is the solicitor of the Corporation for this purpose, and this gentleman is the principal clerk in his office.

Thesiger proposed to ask Mr. Brand this question—Is any property held of the City at the rent described in the particulars of sale ?

PARKE, B.—That he can only know by the contents of the deed.

For the defendant, Mr. Longmore was called. He said, “ I have been subpoenaed to produce my lease ; Mr. Malme has it. I know the house in question ; I pay 60*l*. a year ground rent for that and other houses.”

PARKE, B.—What he paid the 60*l*. for is a fact, but that will not advance the case.

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Mr. Malme was called.—He said, “I have been subpoenaed to produce the lease; I have it, but decline to produce it.”

PARKE, B.—If you have any one who has seen this lease, who does not claim under it as one of his title deeds, and who is not privileged as attorney or solicitor, he may give secondary evidence of its contents. There is an impossibility of your producing it, as the person who has it cannot be compelled to produce it under his subpoena (a).

Mr. Longmore recalled.—Mr. Malme has advanced money on the lease, and holds it as his security.

Theisiger.—As there is no assignment to Mr. Malme, he is a mere depositary of the lease.

PARKE, B.—He has advanced money, and he has the lease as his security.

Mr. Malme.—I hold these deeds as equitable mortgagee, with a bond that Mr. Longmore will convey to me on request; I have advanced 5,800*l*. on these premises and others.

(a) In the case of *Bate v. Kinsey*, 1 C. M. & R. 38, which was an action of debt for rent by the assignee of the reversion against the assignee of the term, the plaintiff's attorney was called for the plaintiff to prove the execution of a deed. On his cross-examination, he admitted that there had been another deed between the same parties relating to the same premises, executed after the former, and that he had that deed in Court, but he refused to produce it, relying on his privilege. The

defendant's counsel then offered to adduce parol evidence of the contents of the deed (without stating what that evidence was). No notice to produce had been given, and the Court held that parol evidence was rightly rejected; and Lord *Lyndhurst*, C.B. said, “it is quite clear that the attorney, though willing, could not have been permitted to give such evidence.” See also the cases of *Schlenker v. Morey and Another*, ante, Vol. 1. p. 178, and *Marston v. Downes*, ante, p. 381.

Thesiger.—Are not these premises held under a lease from the City?

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Erle.—I must object to the witness being asked to disclose his title.

PARKE, B.—You have no right to object. This gentleman may now, as against you, be legally asked the contents of the deed, the person having it making a valid objection to its production. You are not counsel for the witness; but he may object to answer if he thinks proper.

Thesiger.—Is not this house held with others under a lease you hold of the City?

Mr. Malme.—I decline to answer that.

PARKE, B.—That he may do.

The City Solicitor, Mr. Finch Newman, was sent to; and he stated that he would not, on the part of the City, waive his objection to the production of the counterpart of the lease, unless the tenants would withdraw theirs.

PARKE, B.—Then it cannot be produced.

Thesiger.—Mr. Brand is the attesting witness of the lease. Is not he a trustee of his knowledge for all parties?

PARKE, B.—No, he does not get his knowledge as attesting witness; no attesting witness ever does.

Mr. Brand.—I have received another message from the City solicitor, who says, that he will withdraw his objection to the production of the counterpart of the lease, if your Lordship thinks this a case in which he ought to do so.

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PARKE, B.—I think that the City solicitor acts most correctly; and I think that this is a case in which the counterpart ought to be produced, as the production cannot prejudice the City in any way.

The counterpart lease was put in by Mr. Brand, and by it it appeared that the house in question and three others were demised by the Corporation of the City of London at a ground-rent of 35*l.* a year.

PARKE, B.—The only question is, whether this is a mistake or not. The term “ground-rent” means rent payable to the Corporation. On these particulars the purchaser had a right to expect a lease from Mr. Malme, subject to a ground rent of 15*l.* payable to the Corporation. The purchaser had therefore a right to avoid the sale, unless the jury should think the misdescription arose from mistake. In the *Lancaster case* (a), the mistake arose from the miscopying of a map. This is a misdescription that would materially enhance the value.

For the plaintiff, Mr. Thompson, the plaintiff’s attorney, was called; and he stated, that he had no information beyond that which was contained in the draft lease from Mr. Malme to Mr. Sutton, and that he was not aware that any larger ground-rent was payable than 15*l.*

PARKE, B.—In the draft lease it is called a “yearly rent,” and not a ground rent. If the purchaser could

(a) *Wright v. Wilson*, 1 M. & Rob. 207. In that case it appeared that the particulars of sale referred to a map, in which a turnpike-road was set out as if close to the premises, when in truth it was not a turnpike road, but a mere footpath. There was the usual condition of sale, as to

“mistake of description, or other immaterial error,” not annulling the sale. Parke, B.—Left it to the jury to say whether the misdescription was a “wilful and designed one,” or whether it “had originated in error;” and his Lordship held that the *onus* of proving the fraud lay on the defendant.

have recovered back the deposit, if it had been paid in cash, that would be a good defence to an action on a check or bill given for the amount of the deposit; that is the criterion.

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Thesiger.—That was your Lordship's opinion in the case of *Spiller v. Westlake* (a).

PARKE, B., (in summing up).—The question is, was this a wilful misdescription by the assignees, or by some of their agents, or was it a mistake. I should say it was a wilful misdescription, and that there is no doubt about it: but I also think, that these pleas do not let in the defence. You will, therefore, find the facts, and refer it to the Court, under the stat. 3 & 4 Will. 4, c. 42, s. 24 (b); and if the Court think this a variance within that statute the finding will avail. If they think this a case not within its provisions, they will order judgment for the plaintiff.

Thesiger, for the defendant, referred to sects. 23 and 24 of the statute (c).

PARKE, B.—I think that this is not a check given without consideration, but one which the defendant had a right to avoid, as the vendor was not in a condition to convey that which he contracted to convey; but I also think that the defendant's present plea will not avail him, the facts must be found specially.

Verdict—A special finding of the facts.

Esle, and *Rawlinson*, for the plaintiff.

Thesiger, and *Chandless*, for the defendant.

[Attornies—*M. Thompson*, and *Lawrance & Co.*]

(a) 2 B. & Ad. 155.

(b) Set forth, ante, p. 531, n.

(c) Set forth, ante, p. 531, n.

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IN the ensuing term, *Chandless* obtained a rule to shew cause why the verdict should not be entered for the defendant, on the ground that the defence was admissible under the plea pleaded, or why judgment should not be given for the defendant under the stat. 3 & 4 Will. 4, c. 42, s. 24.

The Court granted the rule upon both points; and, after it was argued, they took time to consider of their judgment.

As the following is an important "no consideration," we have sub-
case on the subject of the plea of joined it.

HILARY TERM, 1835.—BEFORE LORD ABINGER, C. B., PARKE, B., BOL-
LAND, B., AND GURNEY, B.

EASTON v. PRATCHETT.

A plea, that a bill of exchange was indorsed by the defendant to the plaintiff without consideration, is bad, on special demurrer, but good after verdict.

In an action on a bill of exchange, a defendant, instead of pleading a plea of "no consideration," should plead affirmatively any matter of defence.

ASSUMPSIT by the plaintiff as the indorsee of a bill of exchange for 100*l.*, drawn by the defendant on Peter Maddock, payable to the defendant's order, and by him indorsed to the plaintiff. Plea—that the defendant indorsed the bill to the plaintiff, "without having or receiving any value or consideration whatsoever for or in respect of the said indorsement." Replication—that the defendant "had and received from the plaintiff a good and sufficient consideration for the indorsement of the said bill" to the plaintiff.

This case was tried at the Lancaster Summer Assizes, before Mr. Baron Gurney, and on this issue the jury found a verdict for the defendant; and, afterwards,

R. Alexander obtained a rule to shew cause why judgment should not be entered for the plaintiff *non obstante verdicto*, on the ground that this plea was bad even after verdict. This rule was argued, and the Court took time to consider.

Lord ABINGER, on a subsequent day, delivered the judgment of the Court.—"The special matter which is now to be pleaded by a defendant in actions on bills of exchange is not merely to be like the notice that used to be given of an intention to dispute the consideration, but is intended to inform the plaintiff of the real nature of the defence, such as

that the bill was accepted for the accommodation of another, or for a consideration that afterwards failed, or that the bill was given for a gambling transaction, or the like, each of which defences the defendant must now prove. We are of opinion that the plea pleaded in the present case would be bad on special demurrer; but the question here is, whether, after verdict, it is to be considered as a good or a bad plea. Now, we cannot say, that, after verdict, it is a bad plea; it is a plea upon which both parties were at liberty to go into evidence of the consideration, and the jury have found that this bill was indorsed without any consideration."

Rule discharged.

R. Alexander, and Cowling, for the plaintiff.

Crompton, for the defendant.

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BEFORE MR. BARON ALDERSON.

PETERS v. STANWAY.

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Jan. 17th.

TRESPASS and false imprisonment. Plea — Not guilty; and several pleas of leave and licence.

It appeared, that the plaintiff was a young woman, who went into the service of the defendant, a maiden lady, who lived at Holloway, and let out part of her house to lodgers. After the plaintiff had been there about a week, the defendant missed some silver spoons, and went in consequence to inquire the character of the plaintiff from the wife of a policeman, with whom she had lodged for several weeks previous to her coming into the service. The defendant told the policeman's wife that she wished to see her husband; and, in consequence, the policeman went to the defendant's house, and had some conversation with her in the plaintiff's presence. The defendant said, the spoons were

In an action of trespass and false imprisonment for causing a person to be taken to a police station-house, if it appear that the going proceeded originally from the plaintiff's own will, the defendant will be entitled to a verdict on either "*Not guilty,*" or "*leave and licence,*" pleaded; but the plaintiff will not be deprived of his right to recover damages,

if it appear that, *being acted upon* by the defendant's having made a charge of felony against him in the presence of a policeman, he *went voluntarily* with the policeman to the station-house for the purpose of meeting the charge.

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correct on the Monday night, and on the Tuesday they were missing. The plaintiff said to the defendant—"You cleared out all the cupboards on Tuesday yourself." The defendant asked the policeman what she should do. He told her, if she thought the girl had stolen the spoons, or made away with them, the only remedy she had was to give her in charge, and have her taken before a magistrate. The defendant then consulted with her sister, who was present, and said—"Then I must." The plaintiff's box and room were searched, but the spoons were not found. All the rooms were searched, except those occupied by the lodgers, and they were omitted, because the defendant said she was sure the property was not there. The plaintiff walked by the side of the policeman, but without his touching her, to the station-house. The policeman swore at the trial that the defendant gave charge of the plaintiff, and he took her to the station-house, where the defendant had some private conversation with the inspector, and then went away, saying, as she left, that she felt herself fatigued, and could not go on any further with it. The plaintiff was told she was discharged, and then expressed a wish to be taken before a magistrate to have the matter settled.

On his cross-examination, he admitted, that, before the defendant gave the plaintiff into his custody, the plaintiff had said that she (the defendant) should go on with it; for, if she did not, she (the plaintiff) would. He also admitted that the defendant had said several times, in the course of the conversation—"I had better *let her go* to the station-house."

It further appeared, that the inspector told the defendant there was not sufficient evidence, and that she was liable to an action, upon which she became alarmed, and said that she should forego the charge.

Bompas, Serjt., for the defendant.—The defendant acted just as an unprotected female would under such cir-

cumstances. She asked the policeman, with whom the plaintiff had been lodging, what she ought to do; and he suggested the giving her in charge. The words—"I had better *let* her go," imply that the plaintiff had previously insisted on going. What a state of society it would be, if a person, without any ill will toward a servant, making an inquiry into a supposed robbery, is to be liable to an action for saying—"I had better let her go;" and, in consequence, the servant walks to the station-house beside a policeman, at whose house she had lodged. The pleas are, *not guilty*; and then, in substance, that the plaintiff insisted on going, and the defendant let her, and went with her to make the charge. Was it not the determination of the plaintiff to go to the station-house? If it was, and the defendant only consented, the defendant is entitled to the verdict. The case of *Arrowsmith v. Le Mesurier* (a) is an authority to shew, that, if a person goes voluntarily with a constable, it is not an imprisonment. Is it not manifest, from the whole of the evidence, that the plaintiff went of her own will? If it had not been for her own determination, and the conduct of her friend the policeman, it is evident she never would have gone at all.

ALDERSON, B., (in summing up) said—The question as to the verdict will depend, not on whether the plaintiff went voluntarily from the defendant's house to the station-house, but whether she volunteered to go in the first instance. There is a great difference between the case of a person who volunteers to go in the first instance, and that of a person who, having a charge made against him, goes voluntarily to meet it. The question therefore is, whether you think the going to the station-house proceeded originally from the plaintiff's own willingness, or from the defendant's making a charge against her; for, if

(a) 2 New Rep. 211, mentioned in the case of *Wood v. Lane*, post, and the case of *Chinn v. Morris*, ante, Vol. 2. p. 361.

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it proceeded from the defendant's making a charge, the plaintiff will not be deprived of her right of action by her having willingly gone to meet the charge. With respect to the manner in which the plaintiff went to the station-house, you would not aggravate the damages on account of her having walked beside the policeman. It is very different from the case of a man being taken handcuffed or by the collar through the streets, as that affects his character; but this walking beside the policeman, without his laying hold of her, would not produce any injury to the plaintiff's character. She might be taken for his daughter, or his wife, or his sister; and any person meeting them would not draw any conclusion prejudicial to her from the circumstance of their being together. The inspector gave the defendant very proper advice; and the policeman, when asked at first, ought to have told her that there was not sufficient to justify her giving charge of the plaintiff. The words used by the plaintiff—"If you do not go on with it I will," can hardly be taken as an expression of a desire to go voluntarily, her mind and will not having been previously acted upon by what was done by the defendant. The words—"I had better let her go," which it appears were used by the defendant, might seem as if she consented to an express wish of the plaintiff's to be taken to the station-house. But, I think it would be rather a straining of the evidence to suppose that she expressed such a wish, without having been acted on by the the defendant's previous conduct in making the charge against her.

The jury inquired of his Lordship what was the largest amount of the damages they could give without entitling the plaintiff to costs.

ALDERSON, B. said—He doubted whether he ought to inform them, as it was rather a matter of law. But he

afterwards added—"The smallest damages will carry costs, unless I do something."

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Verdict for the plaintiff—Damages, 40*s*.

Stammers, and *Laurie*, for the plaintiff.

Bompas, Serjt., and *White*, for the defendant.

[Attornies—*Wontner*, and *Wright & T.*]

See the cases of *Cant v. Parsons*, ante, p. 504, and *Wood v. Lane*, post, p. 774.

First Sitting at Westminster, in Hilary Term, 1834.

BEFORE MR. BARON ALDERSON.

COOK v. NETHERCOTE.

Jan. 21st.

ASSAULT.—The declaration, which consisted of only one count, stated that the defendant gave to the plaintiff "a most severe and violent kick" upon one of his legs, which prevented him from attending his business. Pleas—*first*, not guilty; *second*, that the plaintiff made an assault on the defendant, laid hold of the defendant, and dragged him about, and struck him, and that, to defend himself, he assaulted the plaintiff; *third*, that the plaintiff assaulted the defendant, and would have beaten, bruised, and ill-treated him, if he had not defended himself. Replication, to the second plea, that, just before the time when &c., at an early and unreasonable hour of the morning, the defendant and four others, in an unlawful and

To justify a constable in apprehending a party without warrant for an affray, it is essential that the party should have been engaged in the affray, and that the constable should have had view of the affray, while the party was so engaged in it, and that the affray was still continuing at the time of the apprehension.

It is no ground for rejecting a

witness's evidence, that he remained in Court after an order for all the witnesses to leave the Court, it is merely matter of observation on his evidence.

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riotous manner, and without any lawful or probable cause or reason, knocked loudly and violently at the doors of divers houses at Eton, and made and continued making great noise, disturbance, and affray, to the terror and alarm of his Majesty's subjects; and that the defendant was continuing such noise, disturbance, and affray, whereupon James William Needham (then being high constable of and for the division in which Eton is situate) had view of the said breach of the peace, and called upon and required the plaintiff to aid and assist him in apprehending the defendant and the other persons, in order that they might be brought before a justice of the peace to answer for such offence; and thereupon the plaintiff, in aid of the said J. W. N., gently laid his hands on the defendant to assist in apprehending him, but did not strike the defendant the blows in the second plea mentioned, which said laying hands, &c. was the same supposed assault as in the plea mentioned, "and thereupon the defendant, being greatly irritated and enraged at the time when &c., of his own wrong did and committed the assault and trespasses in the introduction to the second plea mentioned." This replication then went on to aver, that the plaintiff did not assault the defendant elsewhere or otherwise "than on the occasion and for the purpose in this replication mentioned." To the third plea there was a similar replication. Rejoinder to each of the special replications, *de injurid.*

It appeared, from the evidence of Mr. Needham, the high-constable, that, on the night of the 6th of June, 1833, at about midnight, there was a disturbance at Eton, and that several officers of the regiments of guards, which were quartered at Windsor, were ringing and knocking at many of the doors at Eton; that he begged them to go home, but, instead of doing so, the disturbance continued for near three hours. It further appeared, that, at about three o'clock in the morning, as the plaintiff was looking out at an upstairs window of his house, the high-constable

asked him to assist him in taking the parties into custody; and that the plaintiff accordingly came into the street, when a person named White desired the defendant to go home, and the defendant replied, "If you do not leave me alone I will knock your brains out, or give you a good ducking;" whereupon the plaintiff and White laid hold of the defendant to convey him to the cage; and that, when near the cage door, all three fell down over some rubbish; and it was imputed that at this time the defendant kicked the plaintiff on the leg, in consequence of which he was much injured, and his surgeon's bill amounted to 75*l.* 15*s.* 6*d.* Witnesses were called, with a view of shewing that the defendant, who was an officer in the Royal Horse Guards, was one of the party who had commenced the disturbance at midnight.

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The defence was, that the defendant had taken no part in the disturbance, and that he was not at the place in question till just before he was collared by the plaintiff.

The witnesses on both sides had been ordered out of Court.

On the part of the defendant the Hon. Capt. Stanley was called.

Thesiger, for the plaintiff, asked him if he had not been in Court after the order.

ALDERSON, B.—That would be no ground for rejecting his evidence. It would be only matter of observation respecting his testimony. In one case the Judges granted a new trial, because a witness's evidence had been rejected by reason of his having remained in Court after an order for witnesses to withdraw (*a*).

(*a*) The case referred to by the *Good v. Cox*, (E. T. 30 Geo. 3, in learned Baron is that of *Doe d. K.B.*, cited 1 Clifford's Southwark

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Capt. Stanley was examined ; and stated, *inter alia*, that he had not been in Court after the order for witnesses to withdraw.

ALDERSON, B. (in summing up).—The questions for your consideration in this case are, whether the defendant was engaged in the affray—whether the constable had view of the affray while he was so engaged in it—and whether the affray was continuing at the time that he ordered the plaintiff to apprehend the defendant. If you are satisfied that all these points are made out, then, if the defendant assaulted the plaintiff, while the plaintiff was endeavouring to apprehend him, such assault is unjustifiable, and the verdict ought to be for the plaintiff. If, however, there had been an affray, and that affray were over, then the constable had not and ought not to have the power of apprehending the persons engaged in it; for the power is given him by law to prevent a breach of the peace; and where a breach of the peace had been committed, and was over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant from a

Election Cases, p. 114). In that case *Gould, J.*, would not allow a witness for the defendant to be examined, because he had remained in Court after the witnesses had been ordered to leave it. But the Court of King's Bench were of opinion that the witness ought to have been heard, and granted a new trial. However, as the defendant had been negligent in not keeping his witnesses out of Court when ordered to do so, the Court made him pay the costs of the new trial.

Upon this case Mr. Clifford adds the following note:—"This case is nowhere in print, but I was

favoured with it by a learned friend, whose accuracy as a reporter is too well established to need any commendation from me."

In the case of *Parker v. M^r William*, 4 M. & P. 480, it was held, that, where a witness remains in Court, after an order for witnesses on both sides to withdraw, it rests in the discretion of the Judge whether such witness shall be heard; except in the Exchequer, where he is peremptorily excluded. See also the case of *Beamon v. Ellice*, ante, Vol. 4, p. 585, and the notes to that case.

magistrate. You must, therefore, before you find for the plaintiff, be satisfied that the defendant was a party to the affray, and that the affray was continuing at the time of his apprehension. The right of the plaintiff to apprehend the defendant is a serious question, involving the power of constables, and a wrong decision upon it would materially affect the liberty of the subject. The words used by the defendant would be no justification for his apprehension, unless he was a party to the affray; and you think that those words shewed that the affray was still continuing. If the apprehension of the defendant were unlawful, he had, unquestionably, a right to struggle to get away; but, if the apprehension was lawful, he had no right to do so, and is answerable for all the consequences.

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Verdict for the plaintiff—Damages, 125*l.* 15*s.* 6*d.*

Thesiger, and *Ball*, for the plaintiff.

Talfourd, Serjt., and *Wordsworth*, for the defendant.

[Attornies—*Poole & Gamlen*, and *Vowles*.]

(a) See the case of *Howell v. Jackson*, ante, p. 723.

BEFORE MR. BARON GURNEY.

KNAPP and Another *v.* HARDEN.

Jan. 22nd.

ASSUMPSIT for work and labour. Pleas—*first*, non assumpsit; *second*, that the work and labour were done work. B. wrote a letter to his agent, stating that he would agree to the prices, if A. would consent to be paid at stated periods, the first payment to be "in November." The agent shewed this letter to A., and said to him that he might consider the 100*l.* to be payable on the "1st of November." A. afterwards did the work for B. It was left to the jury to say whether that which the agent said to A. formed a part of the actual contract between the parties, or whether it was a mere observation by the agent himself.

A. sent to B.'s agent a list of prices at which he would do

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upon and under a contract that the same should be paid for in manner following, that is to say, 100*l.* in the month of November, 1834, and the remainder at other days (which were stated); and that the action had been commenced before the first payment became due. Replication—that the work and labour were not done upon and under the contract stated in the plea.

It appeared that the plaintiff had written to the defendant's surveyor, Mr. Warwick, a statement of the prices for which he would do the work; and that the defendant had afterwards written to Mr. Warwick a letter (which was read in evidence), which stated that the defendant consented to the prices mentioned by the plaintiff, provided that the amount was to be payable by portions, at stated periods, and that the first of them should be payable in the month of November. It further appeared that Mr. Warwick shewed this letter to the plaintiff, and, at the same time, told him that he might consider the 100*l.* payable "in November"—to be payable on the 1st of November, and that the plaintiff thereupon said he would do the work, and he, in fact, afterwards did it.

Kelly, for the defendant, submitted that what was said by the surveyor could not control the written document, and that therefore the agreement was satisfied, if 100*l.* was paid in November.

Thesiger, for the plaintiff.—A letter written by the defendant to his own surveyor is not the contract between these parties. I should submit that the terms of the contract are to be gathered from what took place between the plaintiff and the defendant's agent at the time when the contract was made.

GURNEY, B. (having conferred with the other learned Barons) left it to the jury to say whether that which was said by Mr. Warwick to the plaintiff formed a part of the contract between the parties, or whether it was a

mere observation of Mr. Warwick's, and distinct from the contract itself.

Verdict for the defendant.

Thesiger, and *Chandless*, for the plaintiff.

Kelly, for the defendant.

[Attornies—*Carlton*, and *Gaines*.]

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Adjourned Sittings at Westminster, after Trinity Term, 1834.

BEFORE LORD LYNTHURST, C. B.

FLETCHER v. SAUNDERS and Another (a).

June 27th.

CASE.—The *first* count was for distraining for a sum of 2*l.* 10*s.* as being due for rent from the plaintiff to the defendant, when a sum of only 2*l.* 7*s.* 6*d.* was due. *Second* count, for removing the goods off the premises without giving notice. *Third* count, that the defendant sold and disposed of the goods, and did not cause the distress to be appraised by *two sworn appraisers*, sworn by the sheriff, under-sheriff, or constable, to appraise the same, according to the best of their understandings. *Fourth* count, that there was no signed copy of charges delivered as required by 57 Geo. 3, c. 93, s. 6. Plea—Not guilty (b).

Held, at Nisi Prius, that, on a distress for rent, where the rent distrained for does not exceed 20*l.*, only *one* sworn appraiser is necessary since the stat. 57 Geo. 3, c. 93.

It appeared, that the defendant had distrained on the goods of the plaintiff for arrears of rent amounting to

(a) As this case was omitted in its proper order, we have inserted it here.

(b) Under the stat. 11 Geo. 2, c. 19, s. 21. It should be observed, that, by the statute 3 & 4 Will. 4, c. 42, s. 1, (under the provisions of which the rules of pleading of H. T. 4 Will. 4, have

their authority) provides, that no rule to be made in pursuance of that statute shall have the effect of depriving any person of the power of pleading the general issue, and giving special matter in evidence, where he is now or hereafter shall be entitled to do so by virtue of any act of Parliament.

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2*l.* 10*s.*, and that the goods had been sold after an appraisement by *one sworn appraiser* only.

Bompas, Serjt.—I submit that there ought to have been two sworn appraisers. By the stat. 2 W. & M. sess. 1, c. 5, it is expressly enacted, that, before goods taken as a distress for rent are sold, they shall be “appraised by two sworn appraisers (whom such sheriff, under-sheriff, or constable are hereby empowered to swear to appraise the same truly, according to the best of their understandings, and after such appraisement” the goods may be sold. I admit that the sum distrained for in the present case does not exceed 20*l.*, it being only 2*l.* 10*s.* I am aware, that, in the schedule of the stat. 57 Geo. 3, c. 93, which contains a table of the costs and charges to be taken on distresses for rent where the sum does not exceed 20*l.*, there is the following expression:—“Appraisement, whether by *one broker* or more, sixpence in the pound on the value of the goods;” but I should still submit that a casual expression to be found in a mere table ought not to be taken to repeal an express provision in the first section of the stat. 2 W. & M. sess. 1, c. 5.

Lord LYNTHURST, C. B.—I think that one appraiser will do, where the sum distrained for does not exceed 20*l.* I think that the defendants have done all that they were required to do (*a*). The plaintiff must be nonsuited.

Nonsuit.

Bompas, Serjt., and *Mansel*, for the plaintiff.

Thesiger, and *Ball*, for the defendants.

IN the ensuing term, *Mansel* applied for a new trial, on grounds not at all affecting the point of law above mentioned, and a *stet processus* was afterwards entered by consent.

(*a*) See the case of *Bishop v. Briant*, ante, p. 484, in which this case is alluded to,

COURT OF COMMON PLEAS.

Adjourned Sittings at Westminster, after Michaelmas Term, 1834.

BEFORE LORD CHIEF JUSTICE TINDAL.

POTTS v. SPARROW.

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Dec. 3rd.

ASSUMPSIT on an attorney's bill. Plea—the general issue. The claim was of 58*l.* 7*s.* 2*d.*, being 57*l.* 6*s.* 2*d.* for preparing a certain deed and commencing a certain action in the Common Pleas, and 1*l.* 1*s.* for preparing a will. The circumstances of the case were these:—In the month of September, 1824, a person named Thomas Stanley employed the plaintiff to prepare an agreement between him and a person named Jones, by which, in consideration of Stanley's undertaking to furnish information by which Jones might be enabled to raise some large sums of money, Jones covenanted to pay Stanley an eighth part of whatever money he obtained. The plaintiff employed a conveyancer in considerable practice to draw the agreement, who gave an opinion in favour of its validity. The document was executed; and, in the year 1829, Stanley died. Soon after his death, Jones, in consequence of the information he had given, recovered by compromise a sum of 14,000*l.*; and, in July, 1830, administration of Stanley's effects was granted to his daughter. Shortly after this, the defendant Sparrow consulted the plaintiff as to taking proceedings to recover the amount due from Jones under the above-mentioned agreement, and also employed him to prepare another agreement between him and Miss Stanley as her father's administratrix, which

An agreement was entered into between A. and B., B. died, and administration of his effects was granted to C., his daughter. D., who was a friend of C., employed the same attorney who had prepared the original agreement to prepare another between him and C., by which he was authorized to bring an action against A. on the original agreement in C.'s name, and also instructed the attorney to bring such action. The action was brought, and, after argument on demurrer, the original agreement was declared void, on the ground of *champerty*. But it appeared that the attorney, in preparing such original agreement, had

consulted a conveyancer, who gave it as his opinion that the agreement was valid:—Held, at *Nisi Prius*, that the attorney was entitled, under the circumstances, to recover from D., his employer, the costs of preparing the second agreement, and also those of bringing the action upon the first.

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the plaintiff accordingly prepared, and which was executed on the 7th August, 1830. It recited the agreement between Thomas Stanley and Jones, and Stanley's death, and the grant of administration to his daughter; and, also, that the defendant Sparrow had agreed to recover the sum owing. It contained a covenant by Miss Stanley to pay him all the expenses he should incur; and, to enable him to recover it, she appointed the defendant her attorney to receive it, and give receipts and bring actions, and use her name, and do all other necessary acts for the recovery of the money as fully as she herself could do. After this, the defendant frequently called on the plaintiff on the subject of a compromise between Miss Stanley and Jones, and also during the progress of an action of debt which was commenced in the name of Miss Stanley in the Common Pleas to recover the money in question, which was decided on demurrer in favour of Jones, on the ground of champerty (a). A will was prepared by the plaintiff at the same time as the agreement between Miss Stanley and Sparrow, which will she executed, appointing Sparrow sole executor and universal legatee. Sparrow was the only person who instructed the plaintiff about the action, and he directed what Court it should be brought in, and what counsel should be employed in it.

Wilde, Serjt., for the plaintiff.—It is quite clear, that, if an attorney is employed, who uses his best skill and ability, and consults a counsel in whom he has confidence, he may recover his charges whatever the result may be; and he does not, in point of law, guarantee that every contract he prepares shall be good, any more than that every action he brings shall be successful. The law as to maintenance is a very old law, and underwent considerable discussion in the case in question; and it is a subject as to which an attorney could not be supposed to have a distinct knowledge of what would be the result.

(a) See the case reported in 5 Moore & Payne, 193.

TINDAL, C. J.—As to the 1*l*. 1*s*. for preparing the will, there must be a verdict at all events.

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Talfourd, Serjt., for the defendant.—It is all one transaction on the evidence. The original vice in the agreement between Stanley and Jones affects the whole transaction. That was not merely an illegal agreement which the law could not enforce, but an indictable offence; and the second agreement is clearly and equally illegal, as the defendant had no interest in the matter. Therefore, the action is not maintainable.

TINDAL, C. J.—It strikes me at present that it would be too much to say, that, where there is a reasonable doubt whether an instrument be illegal or not, and there is no want of ordinary care and knowledge, and the attorney consults those in whom he has confidence, and acts under their advice—I repeat, it strikes me it would be too much to say that he is to guarantee the result. This is a case in which the Court of Common Pleas, after great deliberation, have decided that the attorney, following the advice of a conveyancer whom he consulted, had wrongfully brought the action, and that it could not be maintained. But I do not think that he ought, therefore, to lose his remuneration. How many cases are there of actions on promissory notes, for which, although they were illegal, yet the attorney has recovered his costs. But I will give you leave to move the Court.

Verdict for the plaintiff, subject &c.

Wilde, Serjt., and *Comyn*, for the plaintiff.

Talfourd, Serjt., and *Ball*, for the defendant.

[Attornies—*Potts & Son*, and *T. & D. Harrison*.]

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IN the ensuing term, *Talfourd*, Serjt., obtained a rule *nisi* for setting aside the verdict (a).

(a) This rule has not yet been argued.

Dec. 3rd.

WALKER v. ALFRED TAYLOR.

The widow of a publican employed an undertaker to conduct the funeral of the deceased, and deposited with him the beer and spirit licences of the house as a security for the payment of his bill. A., one of the firm of the distillers who supplied the house with spirits, by arrangement with the widow, took out administration; B., the other partner in the firm, promised the undertaker, that, if he would give up the licences to him, he would pay his bill for the funeral:—Held, that the undertaker, having given up the licences to B., might recover his bill against B., although the widow was his original employer, and although he had made out his account, charging the administrator as his debtor.

THE declaration stated, in substance, that one Mrs. Cundell was indebted to the plaintiff, and that the plaintiff had a lien on certain documents, and, in consideration that he would give up his lien and the documents, the defendant promised the plaintiff that he would pay his claim on Mrs. Cundell. It then averred that the plaintiff gave up his lien and the documents, but the defendant did not pay, &c. There were also counts for work and labour, goods sold, &c. Pleas—*first*, non assumpsit; *secondly*, that Mrs. Cundell was not indebted to the plaintiff; and, *thirdly*, that the plaintiff had not any lien.

It was proved, on the part of the plaintiff, that a person named Cundell kept the King's Head, in Holborn, and died in September, 1833; that his widow employed the plaintiff to conduct the funeral; that the defendant, Alfred Taylor, in conjunction with his brother and partner David Taylor, had supplied the house with spirits as distillers, and were creditors of the publican at the time of his death; that the defendant, wishing to administer to the deceased's effects, offered the widow 30% to allow him to do so. She consented, but in addition stipulated that he should pay the undertaker's bill; that the defendant paid her the 30%, and gave orders to the plaintiff, who was also an appraiser, to make an inventory, and value the stock; that the letters of administration were granted in the name of

David Taylor, and not of Alfred; and that the widow having delivered the beer and spirit licences to the plaintiff on a security for the payment of his bill, the defendant, Alfred Taylor, made application to him to give them up, and in consequence the plaintiff had an interview with him, in the presence of a witness, who stated that the defendant said to the plaintiff, "Have you got the licences and the bill?" that the plaintiff said he would give up the licences, and hand him the bill for the funeral, provided that bill was paid; that the defendant said "he would see him paid," or "it should be paid;" and thereupon the plaintiff went away, leaving with the defendant both the licences and the bill.

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Andrews, Serjt., for the defendant.—Is this such a promise as is binding? It is to pay the debt of another.

TINDAL, C. J.—You mean under the Statute of Frauds. But it is a new contract under a new state of circumstances. It is not "I will pay, if the debtor cannot;" but it is "in consideration of that which is an advantage to me I will pay you this money." There is a whole class of cases in which the matter is excepted from the statute, on account of a consideration arising immediately between the parties. It is a new contract; it has nothing to do with the Statute of Frauds at all.

On the part of the defendant, a letter from the attorney of David Taylor, the administrator, addressed to the plaintiff, demanding the licences, and threatening proceedings if they were not given up, was put in; and also a bill of the plaintiff's, headed "the administrator of the late Mr. Cundell to J. Walker;" and a letter from the plaintiff's attorney, applying for payment, addressed to Messrs. Taylor, distillers.

TINDAL, C. J. (in summing up).—As to the promise to

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pay the funeral bill, the plaintiff had a claim for the funeral expenses on Mrs. Cundell; but it was not necessarily confined to her. He would have a right to proceed against the administrator, and recover them from the estate. But, upon the evidence, it will be for you to say whether Alfred Taylor, the defendant, did or did not in effect promise to pay the money if the licences were given up.

Verdict for the plaintiff.

Wilde, Serjt., and *Chandless*, for the plaintiff.

Andrews, Serjt., and *Busby*, for the defendant.

[Attornies—*Carlton*, and *Venning & R.*]

Dec. 5th.

DREW v. THE NEW RIVER COMPANY.

Where a public company has the right by law of taking up the pavement of the street for the purpose of laying down pipes, the workmen they employ are bound to use such care and caution in doing the work as will protect the King's subjects, themselves using reasonable care, from injury; and if they so lay the stones as to give such an appearance of security as would induce a careful person, using reasonable caution, to tread upon them as safe, when in fact they are not so, the company will be answerable in damages for any injury such person may sustain in consequence.

THE declaration stated that the defendants, on the 16th of June, 1834, were about to perform certain works respecting certain water-pipes of theirs under the pavement of a public footway, and for that purpose had taken up the pavement, and dug a trench, and thrown out of it large quantities of stones, earth, and soil, and by their workmen and servants had laid in the said way divers pickaxes, shovels, and workmen's tools and utensils; and thereupon it became the duty of the defendants, by their workmen and servants, to use due and proper care and precaution in performing the said work, and laying and depositing the said stones, &c., so that the King's subjects might not be injured thereby; but that the defendants did not use proper precautions; and that, by reason of the carelessness

using reasonable caution, to tread upon them as safe, when in fact they are not so, the company will be answerable in damages for any injury such person may sustain in consequence.

and default of the company, by their servants and workmen, the plaintiff, while lawfully passing along, without his default, was thrown, and came against and fell over and upon the said stones, earth, and soil, and was thrown with great violence on the said highway, and was greatly hurt, and divers of his bones and joints were fractured, strained, and injured, and he was ill for a long time, and was put to great expense in retaining another person to carry on his business of a law-stationer, and lost divers gains and profits, and was likely to continue in bad health, and incurred great expenses in endeavouring to get cured. Plea—Not guilty.

It appeared that the plaintiff was a law-stationer, living in Hemlock Court, which was a thoroughfare for foot-passengers, leading out of Carey Street, Lincoln's Inn; and that the defendants, in consequence of application from some of the inhabitants, took up the pavement, and dug a trench, for the purpose of laying down new pipes and repairing the old ones; that the work was begun about six in the morning of the 16th June, and finished, as far as the defendants were concerned, about seven in the evening of the same day; that about noon the plaintiff, having occasion to go into Carey Street, walked along upon the mould, which, with the stones, was laid on each side of the trench, till he got opposite to the house of a female neighbour, when he crossed over the trench, and spoke to her, telling her to be particularly cautious if she went out, in consequence of the dangerous state of the court; and that he had scarcely parted from her, when, according to her account, he stepped upon a stone which was laid insecurely upon another, and slipped, and fell down, and immediately cried out that he had broken his arm. In fact he had dislocated his shoulder, and fractured the scapula. Ten witnesses for the plaintiff proved that the mould and stones were so laid as to make it unsafe for persons to walk along; and it appeared that several slip-

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ped, and some fell down, while others declining to pass sent messages by those who were obliged to go.

On the part of the defendants, it was shewn that they had by act of Parliament a right to take up the pavement, and that they did the work in the usual way. It was further proved, that several hundred persons went safely along the court in the course of the day, one of them an old woman, walking with a crutch and a stick. It was also sworn that there was free space, without any mould upon it, on the side of the court from which the plaintiff crossed over; and it appearing that he had but one eye, it was suggested that the injury resulted from his own want of care, or from accident, and not from any negligence on the part of the workmen.

It was sworn on the part of the plaintiff, but denied on the part of the defendants, that pickaxes and shovels, and other workmen's tools, were left lying about.

TINDAL, C. J. (in summing up).—The defendants have, by the act of Parliament, the right to take up the pavement, but they were bound in doing the work to use such care and caution as would prevent the King's subjects, themselves using reasonable care, from exposure to injury. Even supposing that there was space free from mould and stones for the plaintiff to walk on one side of the trench, yet he was not bound to do so, but had a right to cross over to speak to his neighbour; and if he stepped upon a stone which was, in fact, insecure, but had such an appearance of security as would induce a careful person, using reasonable caution, to think that it was safe, the defendants would be responsible, inasmuch as the so placing the stone would be an act of carelessness and negligence on the part of the workmen.

His Lordship left it to the jury to say, whether the injury was occasioned by negligence and unskilfulness on the part of the workmen, or want of care in the plaintiff himself, or by accident, without fault on either side. In the two latter

cases they would find a verdict for the defendants, and in the former they would find for the plaintiff, and give him such reasonable compensation in damages as they thought he was entitled to under all the circumstances.

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The jury retired, and, after an absence of several hours, found a—

Verdict for the defendants.

Wilde, Serjt., *Ross*, and *Payne*, for the plaintiff.

Follett, and *S. B. Harrison*, for the defendants.

[Attornies—*Abraham & Robson*, and *Hall, Thomson, & Sewell*.]

ROBERTS v. BROWN.

Dec. 5th.

CASE for a libel in the North Wales Chronicle. Several special pleas of justification had been pleaded, but had been withdrawn.

Seemle, that an action for a libel in a newspaper is a fit case to be tried by a special jury, if there be special pleas of justification; but not if the general issue only be pleaded.

After the jury had returned a verdict for the plaintiff, damages, 5*l*.—

Wilde, Serjt., applied to his Lordship to certify that it was a fit case to be tried by a special jury.

Atcherley, Serjt., opposed the application.

TINDAL, C. J., inquired if the rule for the special jury was obtained before the special pleas were withdrawn; and, being answered in the affirmative, said that such being the case, he would certify; but, if it had been obtained afterwards, he would not have done so.

Wilde, Serjt., and *J. Jervis*, for the plaintiff.

Atcherley, Serjt., and *R. V. Richards*, for the defendants.

[Attornies—*Lowe & Co.*, and *Walmsley & Co.*]

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Dec. 8th.

DESBROW v. WEATHERLEY.

In assumpsit by the indorsee against the acceptor of a bill of exchange, if it appear, that, following the acceptance, there are words not in the acceptor's hand writing, making the bill payable at a particular place, it is incumbent on the plaintiff to shew that the words were written by the acceptor's authority; and it seems that the addition of such words is a material alteration of a bill since, and notwithstanding, the passing of the stat. 1 & 2 Geo. 4, c. 78.

ASSUMPSIT on a bill of exchange, dated 4th of May, 1832, for 450*l.*, at six months, drawn by one H. Williamson on and accepted by the defendant, and indorsed by Williamson to the plaintiff. Plea—Non assumpsit.

Under the words "Accepted, H. O. Weatherley," were written, but not in the defendant's handwriting, the words, "Payable at Messrs. Ashted & Son's, 135, Regent Street."

Mr. Williamson, the drawer, was called as a witness for the plaintiff. He swore that he drew the bill himself, and that the defendant accepted it for his accommodation; that he handed it over to the plaintiff, and received 350*l.* from him upon it; that the bill had not been altered since it was accepted; that he drew it at six months, and not at five, and that he was to provide for it when it became due. With respect to the words "Payable at Messrs. Ashted & Son's," he stated that he could not say whether they were written before or after the defendant accepted the bill, but he thought they were written the same day, yet he would not swear that they were not written on a subsequent day.

Wilde, Serjt., on cross-examination, asked him whether, after the bill was due, he had any communication on the subject with the plaintiff? The witness replied in the affirmative.

Talfourd, Serjt., on re-examination, asked what the communication was.

Wilde, Serjt., objected.

TINDAL, C. J.—Unless the communication was partly got out, I think you are not entitled to ask any question

about it. It was only asked on the other side whether, in fact, any communication was made or not.

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Upon production of the bill it appeared, from inspection, that the word 'six' looked as if it had been altered from the word five, and there was a hole in the paper after the letter *x*. Also, it appeared that there were two memorandums, purporting to shew the time when the bill became due—one was October 7th, and the other November 7th; and it appeared that it was presented for payment at both those times.

Wilde, Serjt.—The bill has evidently been altered by changing it from five to six months. The drawer had to provide for the bill when it became due, and therefore he had an interest in extending the time of payment. There is no safety in judicial investigation, if it can be doubted, on looking at the bill, that it has been altered. *Henman v. Dickinson (a)* is an authority to shew, that, if an alteration is apparent on the face of the bill, the plaintiff must account for it.

TINDAL, C. J.—Here the evidence for the plaintiff is, that there was no alteration at all. It is for the jury; if they think that the bill was altered after acceptance there is an end of the case.

Wilde, Serjt.—There is also the addition, after the signature to the acceptance, of the words "Payable at Messrs. Ashted & Son's." The plaintiff ought to shew that this was written at the time. It may, perhaps, be questioned whether this is a material alteration; but the cases of *Macintosh v. Haydon (b)*, *Tidmarsh v. Grover (c)*, and *Cowie v. Halsal (d)*, all shew that it is.

(a) 5 Bing. 183, and 2 Moore p. 276, in *Taylor v. Moseley*, which & Payne. 289, mentioned ante, p. see.

276, note (f).

(c) 1 Maule & Selw. 735.

(b) Ry. & Moo. 362, cited ante,

(d) 4 B. & A. 197. But see also

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TINDAL, C. J., to the jury.—The bill, in this case, was accepted for the accommodation of the drawer, and the whole case rests upon his evidence. He swears that 350*l.* was advanced to him by the plaintiff upon it. The question is, whether, upon the view of the bill connected with the evidence of the drawer, you think the bill has been altered without the assent of the acceptor; and there is a further question, whether, looking at the bill, as contrasted with his evidence, you can place any reliance on his testimony. One thing is clear, that the person who held the bill thought it was a bill at five months, or at least was in doubt about it, for it was presented, first in October, and again in November. It is for you to decide; but, I should say, looking at it, that it is a bill which at one time was a bill at five months, if it is not so now. You will ask yourselves whether this bill was originally drawn at five months, and has since been altered to six months; and, if you think so, there is an end of the case. [His Lordship read the evidence, and observed]—Thus it stands as to the first alteration. But there is another, which, on the testimony of Mr. Williamson, was made after the acceptance, though he will not say exactly when it was done. I allude to the words, “Payable at Messrs. Ashted & Son’s, 135, Regent Street.” This being an alteration after the acceptance, or at the time, it is incumbent on the plaintiff to shew that it was made with the consent of the party accepting; because a person taking it with this special acceptance might present it only at the particular place, and then sue the acceptor, who might know nothing about it. It would vary the right of parties to a *bona fide* bill; and, in my opinion, it vitiates the bill just as much as the first alteration.

The jury found for the defendant.

Marson v. Pettit, 1 Camp. 82, note; ante, Vol. 2, p. 303; and *Cubley v. Fayle v. Bird*, 6 B. & C. 531; and *Walker*, 2 Cr. & Mee. 151.

Talfourd, Serjt., wished to know upon which of the alterations they founded their verdict; as, if it were upon the last, he should submit, upon the authority of some cases, that it was not a material alteration.

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TINDAL, C. J., said, that the strongest case in favour of its materiality seemed to be *Cowie v. Halsal*.

Walesby, for the plaintiff, observed that that was before the statute.

The jury being asked, said, they founded their verdict upon both the alterations.

Talfourd, Serjt., and *Walesby*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*J. H. Reynolds*, and *Chisholme & W.*]

CROOK v. BRETHAM, Gent., one &c.

Dec. 9th.

ASSUMPSIT.—The *first* count of the declaration stated, that two deeds, the one dated February 27, 1828, made between one J. T. W. and one F. A. S., and the other, dated December 29, 1829, between M. A. W. and F. A. S., were in the possession of the plaintiff, who held them as a security for a sum of money, to wit, 35*l.*; and that a certain mortgage or assurance was about to be executed of certain premises, to which the said deeds related, “from one Mr. Summers to one William Beetham,”

A. gave an undertaking to pay C. 35*l.* upon the execution of a mortgage from S. to B. S. conveyed to B. the property intended to be the subject of the mortgage, by assigning it to him in trust to sell it, and for B. to pay himself the

sum that he had advanced, and to pay 22*l.* to C. as part of his claim, and, after other payments, which were specified, to pay the surplus to S. C. was not only aware of this arrangement, but was at one time intended to have been a trustee under the deed of assignment:—Held, that this conveyance was a mortgage within the meaning of the undertaking, but that C. could not recover, in an action upon the undertaking, the 22*l.* mentioned in the deed, as he had allowed that to become a subject of the trusts.

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and that the defendant was desirous of obtaining possession of the deeds on behalf of the said W. B. ; and that, in consideration that the plaintiff would deliver up the deeds to the defendant, the latter undertook &c. " that he would, on the execution of the said mortgage, retain the said sum of 35*l.* for the said plaintiff, as his alleged claim on the said deeds, or return the said deeds to the said plaintiff." It then went on to state that the plaintiff did deliver the deeds to the defendant; and that, although the said mortgage from the said Mr. S. to the said W. B. had been long since executed, and the defendant was requested to retain or pay to the plaintiff the sum of 35*l.*, or return the deeds, and a reasonable time for that purpose had long elapsed, yet the defendant did not nor would retain for the said plaintiff, or pay him the said sum, nor any part thereof, nor return the deeds. There were also counts for work and labour, money paid, and on an account stated. Plea to the first count of the declaration, " that no mortgage of the said premises, from the said Mr. S. to the said W. B., was or hath ever yet been executed in manner and form as the said plaintiff hath in the said first count of his said declaration alleged, and of this he the said defendant puts himself upon the country, &c." Plea to the other counts—Non assumpsit.

It appeared, that the plaintiff was an auctioneer, and that the deeds in question were placed in the hands of Mr. S. B. Rogers, who was the solicitor of Mr. Summers, with a view to his interest in the property being sold. Mr. Summers was entitled to two-sixths of this property, which consisted of freehold premises in the county of Middlesex ; and, on the 30th of June, 1832, Mr. Rogers placed the deeds in the hands of the plaintiff, with a view to a sale ; Mr. Rogers's lien on them then amounting to 30*l.* Of this 30*l.* the plaintiff gave him 19*l.* 10*s.*, and was to be liable for the remainder.

It further appeared, that the plaintiff made some pre-

parations for a sale; and that the father of the defendant, Mr. William Beetham, who had two mortgages for 280*l.* on other two-sixths of the property, wished to get a mortgage on the two-sixths which Mr. Crook had to sell, in addition to the mortgage which he then held. This led to some negotiation between the parties; and, on the 13th of August, 1832, the plaintiff delivered the deeds to the defendant, on receiving from him the following undertaking:—

“ On the execution of the mortgage from Mr. Summers to Wm. Beetham, Esq., I, on his behalf, agree to retain the sum of 35*l.* for you as your alleged claim on such deeds, or to return the deeds under mentioned.

27th February, 1828. John Thomas Wilkinson to Mr. F. A. Summers.

29th December, 1829. Miss M. A. Wilkinson to Mr. F. A. Summers.

13th August, 1832. (Signed) A. W. Beetham.”

It further appeared, that, on the 1st day of January, 1833, Mr. Summers (on being paid a sum of 20*l.*, half of which was advanced by the plaintiff, and half by Mr. W. Beetham,) executed a deed of conveyance of his two-sixths of the property. The plaintiff was not a party to this conveyance, but was a party to the arrangement which it carried into effect.

This deed, which was an indenture, dated January 1st, 1833, made between Frederick Augustus Summers of the one part, and William Beetham of the other part, after reciting the two deeds which were the subject of the present action, which conveyed the two-sixths of the property to Mr. Summers, and reciting that a debt due to Mr. W. Beetham was secured on other two-sixths, and that 22*l.* was due to the plaintiff, and that 10*l.* had been advanced to Mr. Summers by the plaintiff, and 10*l.* by Mr. W. Beetham, and that Summers had agreed to convey to W. B.; it was witnessed, that, for those considerations, Summers conveyed and assigned the shares mentioned in

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the recited deeds to William Beetham, his heirs, &c., in trust to sell them by public auction or private contract, as he should think proper. This deed also contained powers for carrying such sale into effect, and for indemnifying purchasers, and a declaration that W. B., his executors, &c., should stand possessed of the money arising from such sale, after paying the expenses of preparing the deed and execution of the trusts, in the first place in payment to the plaintiff of the said sum of 22*l.*, without interest, and in the next place in payment of the said sum of 20*l.* to the said William Beetham without interest, and in the next place in payment to the said William Beetham of the said two sums of 140*l.* and 140*l.*, so due to him on mortgage of other two-sixth shares, with all arrears of interest, and an ultimate trust to pay the surplus, if any, to Mr. Summers, his executors, &c.

It appeared, that the sum of 22*l.*, mentioned in the deed, consisted of the 19*l.* 10*s.* paid by the plaintiff to Mr. Rogers, and a sum of 2*l.* 10*s.* for some expenses the plaintiff had been put to; and it further appeared, that, about the time of the execution of this deed, it was in contemplation that the plaintiff should act as auctioneer in the sale of the four-sixths of the property, it being considered that four-sixths of a property would bring a proportionally better price than two-sixths; and it was admitted that the plaintiff did put the four-sixths up to sale, but they were bought in. The charges on that account formed the subject of the plaintiff's claim under the latter counts of the declaration; and the only question on that part of the case was, whether the defendant was liable or his father; and on this no question of law arose.

Coleridge, Serjt., for the defendant, submitted that though not a party to the deed, yet the plaintiff was so far aware of the arrangements thus made, that he must have been taken to have waived his claim upon the undertaking. He also submitted, that the parties, at the time of

the undertaking, had contemplated a mortgage and an advance of money to Mr. Beetham, as was manifest from the word "retain" having been used.

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For the defence, Mr. William Beetham was called; and from his evidence it appeared, that at first it was contemplated that he (Mr. W. B.) should have advanced more money on mortgage, and that the plaintiff was not only aware of the arrangements made by the deed, but that it was proposed that he should have been a trustee in it; and that the reason why he was not so was, that it was intended that he should act as the auctioneer; and he further proved, that, when the deed was executed, the defendant asked for the undertaking, upon which the witness observed, that the undertaking was of no use; but the plaintiff made no answer.

Wilde, Serjt., in reply.—This is a mortgage beyond all doubt within the meaning of this agreement. It does not at all signify to Mr. Crook in what manner Mr. Beetham may choose to take his security. What is obtaining a mortgage? It is the obtaining of an estate as a security for money. It does not depend on the form of the deed. How stand the facts? Mr. Beetham has a mortgage on two-sixths of the estate, and after that he obtains the security of two other sixths in addition; and he contends that this is not a mortgage, because, instead of making a large further advance of money, a sum of 20*l.* only is advanced, and of that the plaintiff found one-half. With respect to the waiver, if the undertaking had been put an end to, that would have been the very reason why it would have been given up when the deed was executed.

TINDAL, C. J., (in summing up).—The first question in this case is, whether a mortgage has been executed from Mr. Summers to Mr. William Beetham. I mean a mortgage, not perhaps according to the strict letter, but whether a mortgage has been substantially executed. I

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have no doubt that this deed amounts to a mortgage. Taking the words of the undertaking, it seems that an advance of money was then contemplated; but the matter afterwards takes a different turn, and, instead of Mr. Beetham advancing a large sum of money, a sum of only 20*l.* is paid to Summers, and Mr. Beetham got his security to over-ride four shares instead of two, and thus acquired a greater benefit than he would have had upon a mortgage. The meaning of the parties I take to have been this, that whenever Summers's two shares were mortgaged, the plaintiff was to be paid, or the deeds returned. It is further alleged, on the part of the defendant, that the plaintiff has waived this agreement; but I do not think that the facts proved make out that statement; indeed, I do not see what motive or object the plaintiff could have in foregoing his security. You will therefore say, whether a mortgage was or was not substantially executed, extending to the two-sixths in addition to the first two-sixths; and if you think there was, the amount of damages will be the sum the plaintiff is liable to pay Mr. Rogers, which is 10*l.* 10*s.*, being the difference between 19*l.* 10*s.* and 30*l.*; for it seems to me, that, by allowing the 22*l.* to become a subject of part of the trusts, he cannot resort to the undertaking for that, and the plaintiff might have consented to forego that in consideration of his having the sale of the property.

The jury wished to find a verdict for the plaintiff for 10*l.* 10*s.*, and for 16*l.* for work and labour, and for 10*l.* advanced to Summers; but, on the Lord Chief Justice informing them that they ought not to find for the latter sum, the verdict was entered for 26*l.* 10*s.*

Wilde, Serjt., and *Butt*, for the plaintiff.

Coleridge, Serjt., for the defendant.

[Attornies—*Umney & L.*, and *Beetham*.]

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*Adjourned Sittings in London after Michaelmas Term,
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BEFORE LORD CHIEF JUSTICE TINDAL.

CRANCH v. THOMAS WHITE.

Dec. 12th.

TROVER for a bill of exchange, dated 13th June, 1833, at four months, for 200*l.*, drawn by the plaintiff on and accepted by one James Plimpton, and indorsed by the plaintiff, and by a person named Boyer, and a person named Roberts.

Boyer was called as a witness for the plaintiff, and, on his examination in chief, he stated that, having a bill to take up, he applied to the plaintiff to do it for him; that the plaintiff, not being in possession of sufficient cash, drew the bill in question, and gave it to him to get discounted, in order to raise money to enable the plaintiff to meet the other bill for the witness; that he, the witness, carried it, about the 5th or 6th of August, to a person named Roberts, who then acted as a bill broker, and, after indorsing it, left it with him, but did not get any money from him. That, in consequence of something which Roberts had said when he applied to him for the money, he went to the defendant about a week or more afterwards, and told him that the bill had been given to him to get discounted; that he had given it to Roberts for that purpose, and understood that he, the defendant, had got it from Roberts with that view, adding, that he, the witness, had no interest in the bill, and, therefore, it must be given back; that the defendant said he had got the bill from Roberts, and *had* placed it to his account, and

A person, having a bill to take up, applied to a friend for assistance, who, not having cash, drew and indorsed a bill, and gave it him to get discounted, that he might be able to lend him the money. The person so intrusted also indorsed the bill, and left it with a bill broker for discount. The bill broker, being indebted to a widow who carried on business as a coal merchant, took the bill to her counting-house and indorsed it, and there gave it to her son, who managed the business for her, and who entered it in the cash book as so much received on account. There was contradictory evidence as to the son's knowledge, at the time he received the bill,

of the circumstances under which it had been obtained; but he, on being informed of them afterwards, refused to give the bill to the drawer, who brought an action of *trover* against him for it. The jury found that the bill was not taken *bond fide* and without notice of the circumstances; and it was held, that the action was maintainable against the son, and need not be brought against the mother.

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should keep it; that the witness told him he understood he had not given any thing for it; upon which the defendant said, he did not care at all about it, that he had got the bill, and *should* place it to Roberts's account. The witness further stated, that he told Roberts what had taken place, and, in consequence, a day or two after, they went together to the defendant's, where he repeated what he had said on the first interview; that neither Roberts nor the defendant denied what he said, but the defendant said he should consult his solicitor, and send an answer in a few days. The witness afterwards went with the plaintiff to the defendant; the plaintiff told the defendant the same as the witness had before, and required the bill to be delivered up to him. The defendant said, he had placed it to Roberts's account, and should retain it. The plaintiff said he would bring an action, or take the parties up before the Lord Mayor. On his cross-examination, the witness stated that the defendant's mother carried on the business, which was that of a coal merchant, and that her name, and not that of the defendant, was on the door and on the carts; and also, that he had seen Roberts in Court that morning.

A notice from the plaintiff, dated the 16th of February, 1834, and *addressed to Mrs. White*, was put in, stating, that the bill was his exclusive property, and requiring her to deliver it up to the bearer.

About the 20th of the same month, a notice was delivered to the plaintiff, *signed by the defendant Thos. White*, stating that the bill in question had been noted, and lay for payment at Messrs. Fry & Thorn's, No. 80, Cheapside, and threatening proceedings unless it was immediately honoured.

Atcherley, Serjt., for the defendant.—Roberts is not called as a witness, though he was seen in Court this morning, and was employed by Boyer, the plaintiff's witness. Roberts negotiated with the defendant, who cannot

give evidence for himself. It is strange, that, if Boyer was only employed to discount the bill, he should put his name upon it. The defendant only acted for his mother, and is made a defendant to prevent his being a witness. Roberts, being indebted to Mrs. White, brought the bill to reduce his account. The bill being indorsed in blank, any person taking it for value may detain it. If it was originally obtained by fraud, accident, or loss, it is the misfortune of the former owner; but, if it comes to a person in the way of business, such person has a right to keep it. I submit that an action cannot be maintained, as the defendant was only his mother's agent, and is not interested in the business.

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TINDAL, C. J.—An action for a tort may. An action may be brought against a clerk in the Bank. You very often bring an action for the goods of a bankrupt, not only against the person interested, but also against a servant^(a).

Atcherley, Serjt.—If he took it only for his mother, and does not affect to claim it in any other way than as for her; he is not answerable.

TINDAL, C. J.—To shew that, you must undo the whole of the evidence; you must make an entirely new case. He says—"I've got it, and shall keep it."

For the defendant, a witness, who was out-door clerk to Mrs. White, was called. He stated, that the defendant was only a clerk, and managed the business for his mother; that Roberts, in August, 1833, owed Mrs. White about 500*l.* for coals; that several applications had been made to him for payment; that, on Monday, the 12th of that

(a) See, on this subject, the cases of *Perkins v. Smith*, 1 Wils. 328; *Stephens v. Ehwall*, 4 M. & Selw. 259; *Alexander v. Southey*, 5 B. & A. 247; *Greenway v. Fisher*, ante, Vol. 1, p. 190; and *Fairman v. Grimble*, ante, Vol. 2, p. 266.

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month, he came to the counting-house with the bill in question, and said he had got a 200*l.* bill, which he would pay over on account; that he then indorsed it, and gave it to the witness to hand over to the defendant, who stood by, that the defendant might enter it in the cash book. On his cross-examination, he admitted that Roberts had been a bankrupt, and that Mrs. White signed his certificate some time after the bill had been delivered, and also that they had had dealings together since. The entry in the memorandum book was read. It was among the entries of cash received in the way of trade, and was in this form—"Monday, 12th August, 1833, Bill, Roberts, 200*l.*"

Wilde, Serjt., in reply.—The notice that the bill was dishonoured, and lying at Fry & Thorn's, is signed "Thomas White." Mrs. White does not appear to have known any thing about it. The plaintiff's notice to Mrs. White is only as to any thing she may do in future. White does not say any thing about his mother in the conversations, or of the payment being made to her. Would Roberts have gone with Boyer, if he had paid the bill on account. Roberts is in Court, and is not called, though Mrs. White signed his certificate, and still deals with him. Boyer states here, in his hearing, a conversation, which, if not true, he could contradict, and yet he is not called. If the bill had been received as payment on account, would not White have said so in the conversations? A bill broker is only liable criminally, if the instructions are given him in writing (s); and, therefore, though the plaintiff threatened criminal proceedings, he could not by law pursue them. But it is most extraordinary that the threat should not have produced an explanation from the defendant. The indorsement does not

(s) See the statute 7 & 8 Geo. 4, v. *White*, ante, Vol. 4, p. 46, and c. 29, s. 49, and the cases of *Rex* the notes thereto.

vary the nature of the transaction. But, supposing the defendant's case to be true, he has not given value for the bill. Handing over for an antecedent debt is not indorsing for value. The rule is this—If a man owes another 100*l.*, and gives a bill for a month's time, it is very doubtful. In a case in the King's Bench against a Baronet, a corn factor, Lord *Tenterden* said, as no money passed, a question would arise whether time was given, not however that that would be enough. The jury found that no time was given. There were two actions in this Court on bills obtained under similar circumstances, and the question then was asked—"What did you give for it?" There was no contract, in the present case, to give time or to sell coals. If the defendant gave no new consideration as a ground for the delivery of the bill, it is not value. I submit, in point of law, that, as the evidence now stands, the defendant is not the holder of the bill for consideration.

The defendant's clerk, in answer to a question from one of the jury, said—"We never discounted for Roberts, nor for any one, only sometimes we take the amount of our demand from a bill, and pay the difference in cash.

TINDAL, C. J. (to the jury).—The question, as far as you are concerned, will be, whether, at the time when Roberts left the bill, the defendant White had any knowledge, or notice, or means of knowledge in his power, that the bill was only put into Roberts's hands for discount; for, if White had the means of knowledge in his power, that Roberts had no property in the bill, but was committing a fraud on the owner of it, he can have no right to keep it. With respect to the evidence, either party might have called Roberts as a witness. It is clear that the bill got into the hands of White on Monday, the 12th of August. [His Lordship read the evidence, and then observed]—It is, at all events, a little surprising, that the defendant does not put forward in the conversations the defence which he sets up now. The notice signed

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Thos. White might lead the plaintiff to suppose that he might bring his action against him, and not against Mrs. White. It is not very material whether the action be brought against one or the other; because you may bring an action against the person whose is the very hand which committed the act complained of, as well as against the party really interested in it. The notice by the plaintiff's attorney, addressed to Mrs. White, seems to have been written about four days before the defendant's notice. This shews that they thought then that the transaction was with Mrs. White. It is not material as to the maintenance of the action, but only upon the question as to whether the action was brought against the defendant for the purpose of closing his mouth. His Lordship then left it to the jury to say, whether the defendant took the bill *bond fide*, without any notice of the manner in which it had been obtained by Roberts?

The jury said, they were of opinion that it was not taken *bond fide*, and without notice.

TINDAL, C. J.—That is a verdict for the plaintiff.

Atcherley, Serjt.—If the verdict should eventually stand, we will deliver up the bill.

Verdict for the damages in the declaration, subject to reduction on the delivering up of the bill, and subject to a motion for a nonsuit.

Wilde, Serjt., and *R. V. Richards*, for the plaintiff.

Atcherley, Serjt., and *Comyn*, for the defendant.

[Attornies—*C. Knight*, and *Fry & Thorn*.]

In the ensuing Term, a motion for a nonsuit was made by *Atcherley*, Serjt.; but the Court refused a rule.

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REEVE v. UNDERHILL and Another.

Dec. 12th.

COVENANT to recover damages for the non-performance of a contract under seal relating to the sale of an innkeeper's business.

The defendants pleaded, that the deed was obtained by fraud and covin; and the affirmative of that issue being upon them—

Aitcherley, Serjt., was about to address the jury, when—

Wilde, Serjt., for the plaintiff, claimed the right to begin, contending that the damages were uncertain, and that some evidence must be given to guide the jury in ascertaining the amount.

TINDAL, C. J.—I am of opinion that the present case is not within the rule which has been laid down by the Judges (a); and therefore, that, the affirmative of the issue being on the defendants, they are entitled to begin. The rule allowing the plaintiff to begin applies to actions for libel, words, malicious prosecution, and similar cases.

Wilde, Serjt., submitted that the damages were just as uncertain in the present case as they could be in any of those which his Lordship had mentioned.

TINDAL, C. J., adhered to the opinion he had expressed, and—

(a) See the case of *Carter v. Jones*, ante, p. 64, where the rule is stated to be in substance, though not in words, as mentioned above by the Lord Chief Justice, viz. that it applies to "all actions for personal injuries, and also for slander and libel."

In covenant to recover damages for the non-performance of an agreement under seal, if the defendant plead only that the deed was obtained by fraud and covin, the affirmative of the issue being upon him, his counsel has a right to begin, although the damages are uncertain, and evidence is requisite to guide the jury in forming their estimate of them.

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Atcherley, Serjt., stated the defendant's case.

Wilde, Serjt., and *Barstow*, for the plaintiff.

Atcherley, Serjt., and *Busby*, for the defendants.

[Attornies—*Austin*, and *Pope*.]

Dec. 13th.

WOOD v. LANE and CLEATON.

Where an attorney's clerk accompanied a creditor to his debtor, and pretended that he was a sheriff's officer, and, in consequence, the debtor went away with them, not willingly, but supposing they had power to compel him, it was held that it was a sufficient arrest to maintain trespass for false imprisonment, although no writ was produced; and it did not distinctly appear that either the creditor or the clerk touched the debtor at all.

TRESPASS and false imprisonment. Pleas—Not guilty, and leave and licence.

It was proved by a member of the plaintiff's family that he was a flannel draper in Castle Street, Holborn, and that, on the 3rd of April, he came home, accompanied by the defendants, Cleaton and Lane; and that the plaintiff said, Cleaton had arrested him at Mr. Sanders's, in Holborn; that the plaintiff's wife asked the defendant Lane, who was, in fact, clerk to Cleaton's attorney, if he had any authority, and he said he had; and, being asked his name, said, "My name is Selby, of Chancery Lane." Lane made several inquiries about the plaintiff's property, and said, he would give him time till eight o'clock in the evening; upon which the other defendant, Cleaton, said, "How can you do that? I will not allow you to give him any time at all." It was proved, that, in fact, Mr. Selby had no bailable process against the plaintiff. A witness was also called, who proved that, in conversation with the defendant Lane on the subject, he said it was a foolish piece of business; that Mr. Cleaton had caused him to do it; that he was very sorry for it, but he thought Mr. Cleaton would indemnify him. There was some uncertainty in the evidence of the conversation, whether the defendant Lane admitted or not that he had taken the plaintiff by the arm.

According to the evidence of Mr. Sanders, at whose

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house the transaction commenced, the plaintiff was bargaining with him for the sale of some goods, and had just made out the invoice, which was lying before him, when the defendant Cleaton came in alone, and asked the plaintiff several times to pay the amount he owed him, or some money on account. The plaintiff said he would not, upon which Cleaton went just outside the door, and returned immediately, followed by the defendant Lane, and pointing to the plaintiff, said, "This is the gentleman." The plaintiff tore up the invoice he had written, and threw it on the fire, and said, "I suppose I am to go with you." The answer given was, "Yes." The plaintiff and the two defendants went away together.

Talfourd, Serjt., for the defendant.—No arrest has been proved. Sanders, who was present, says nothing of the laying hold of the plaintiff.

TINDAL, C. J.—The question is, whether the plaintiff went voluntarily from Mr. Sanders's to his own house, or whether he went in consequence of the acts of the defendants. If you put your hand upon a man, or tell him he must go with you, and he goes, supposing you to have the power to enforce him, is not that an arrest? May you not arrest without touching a man?

Talfourd, Serjt.—I apprehend not, without either touching him or producing some authority. There was a case in which I was at Gloucester, before Mr. Baron *Al-derson*, where the party was not touched, and it was held to be no arrest.

TINDAL, C. J.—That was an action against the sheriff, not an action for false imprisonment. The question here is, whether the plaintiff went with the defendants under an impression operating on his mind that they had the power they represented themselves to have.

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White referred to the case of *Arrowsmith v. Le Mesurier (a)*.

TINDAL, C. J.—That is a case which has often been spoken of as going to the very extreme point; but in that case the jury found that the plaintiff went voluntarily with the officer. And in this case, if you can persuade the jury that the plaintiff went voluntarily, you may succeed.

Talfourd, Serjt., then addressed the jury for the defendants.—There was no real compulsion. No writ was produced. It was only an endeavour by a manœuvre to make the plaintiff do what he ought, but would not, viz. pay the money which he owed. It was a sudden thought which struck the attorney's clerk, and it is not a case for damages.

TINDAL, C. J., in summing up, told the jury, that, if the plaintiff was acting as an unwilling agent at the time and against his own will, when he went to his own house from that of Sanders, it was just as much an arrest as if the defendants had forced him along.

The jury found for the plaintiff—Damages 10*l.* (*b*).

Wilde, Serjt., and *Ball*, for the plaintiff.

Talfourd, Serjt., and *G. T. White*, for the defendants.

[Attornies—*W. J. Norton*, and *Billing*.]

(*a*) 2 N. R. 211. According to that case, if a magistrate's warrant be shewn by the constable, who has the execution of it, to the party charged with an offence, and he thereupon, without compulsion, attend the magistrate, and, after examination, be dismissed, it will not be such

an arrest as to support trespass and false imprisonment. Sir *James Mansfield*, C. J., in that case, said, "The plaintiff went voluntarily before the magistrate."

(*b*) See the cases of *Cant v. Parsons*, ante, p. 504; *Peters v. Stanway*, ante, p. 737; and *Bloomfield v. Blake*, ante, p. 75.

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Dec. 13th.

SKIDMORE v. BOOTH.

TRESPASS for breaking and entering the plaintiff's warehouse, and seizing on certain goods. There were several counts setting out different trespasses. One of them stated that the defendant took divers goods and chattels, to wit, &c., and carried away the same, and converted them to his own use. Another stated, that the defendant, with a certain police constable, acting as his servant, and by his command, broke and entered the plaintiff's apartments, and took goods, and delivered them to the custody of such police constable, and, together with him, kept charge of them for several hours, by means of which the defendant was prevented from carrying on his business, and was injured in his credit and reputation, and suspected to have been guilty of some criminal offence, &c. Another count stated the detention of goods for some time, which ought to have been delivered sooner to a customer, naming him. Plea—Not guilty.

The plaintiff was tenant to the defendant of a warehouse and counting-house, being part of a house in Bucklersbury, in which the defendant himself resided.

From the evidence of a lad about fourteen years of age, who was in the plaintiff's employ at the time, it appeared that the plaintiff carried on the business of a drysalter on the premises in question, and, having occasion to go to Liverpool for a few days on the 23rd of June, told the defendant his intention, and, referring to the rent which would be due the next day, asked if it would do when he came to town. The defendant replied that it would do very well. The plaintiff left London, and on the next day, about five in the afternoon, when the boy had locked up the warehouse, and was proceeding along a passage which the plaintiff and defendant both used in common, the defendant met him and asked him for the key. He said he would not give it him; upon which he seized him by the collar,

In making a distress for rent, circumstances may occur which may require the presence of a police officer. But, to justify the landlord in calling him in, it must be shewn that his presence was rendered necessary either from threats of resistance or the apprehension of violence, &c.

If a landlord be lawfully on his tenant's premises for the purpose of making a distress, he may put up a bill in the window for the purpose of letting them, without thereby making himself liable as a trespasser.

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threw him down upon the floor, knelt upon his chest, and called to his housemaid—"Bring me a rope and I'll hang him to the beam." He afterwards let the boy go, on a promise to give him the key the next day. Nothing particular happened on the next day, the 25th; but the key was not given up. On the 26th, about eleven in the morning, the defendant came into the warehouse, accompanied by two men, and said to the boy—"My man, I am come to seize these goods." Upon this, one of the men who came with him proceeded to open the goods and inspect them, while the other wrote down a list of them. While they were so engaged, the defendant went out and fetched in a policeman. The policeman was called on the part of the plaintiff, and stated that the defendant came to him and said that he wanted him at 13, Bucklersbury, as the boy would not give up the keys. The policeman asked him what keys? and he said, the boy's master was no better than a swindler, and had gone away the day before quarter-day, and he wished to have the keys in order to take care of the goods; and he wished to frighten the boy to make him give them up. The policeman went with him, and when they got into the warehouse, the defendant said to the boy—"Now I've got a policeman, and if you don't give up the keys I'll have you taken to the station-house." The boy began to cry, and about a dozen persons were collected about the door inquiring what was the matter. The defendant stuck up a bill in the window of the warehouse, stating that it was to let, and referring to himself for particulars. The two men remained about two hours altogether; and when they went away, the policeman, by desire of the defendant, remained before the door for about half an hour. It also appeared, that a customer, who had bargained for some goods before the plaintiff left town, sent his man for them. The defendant at first refused to let them go, but afterwards consented. The customer himself came in a day or two after, intending to order some more, but did not, seeing the bill in the

window, and the confusion in which the goods appeared to be. When the plaintiff came to town, which he did in a few days, he took down the bill and paid the quarter's rent, for which the defendant gave him a receipt, without saying any thing about any expenses of distress. The policeman on his cross-examination said, that he had frequently seen distresses for rent, and that the conduct of the men was similar to that of persons engaged in making a distress.

Wilde, Serjt., for the defendant, contended, that at the time of the assault on the boy there was not any trespass, as it took place in the defendant's own passage. And, with respect to the rest, he submitted that it was quite consistent with an entry to distrain. It was clear that the rent was due and not paid, and the defendant had a right to make a distress, and did in point of fact do so. He also contended that the boy's story was very improbable.

TINDAL, C. J., (in summing up), said—The plaintiff cannot have any remedy for the assault on the boy, as it took place, according to the evidence, in the defendant's own passage. There was therefore no trespass in that. On the next day the defendant came in, and there was no trespass committed on that day. On the following day, the defendant comes and says, "I am come to seize these goods;" and you will have to say, whether what took place on that day satisfies your minds that a distress for rent was taken at that time. There is no doubt that there was rent due. The two men might have been called to shew why they were there. You must satisfy yourselves that the entry of the two men and that of the policeman were all connected with the distress. The difficulty I feel in the case is upon what the policeman has said. Circumstances may arise which may require the presence of a peace-officer. But it must be shewn, to justify such a proceeding, that it was necessary, either from the apprehension of vio-

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lence, the threat of resistance, or some similar circumstance. It does not appear that either of the men remained in possession (a). If the policeman was introduced other than as an assistant in taking the distress, you must find your verdict for the plaintiff, and give him such damages as you think he is entitled to. It appears that people assembled on the outside, and asked what was going on. The landlord cannot justify under this form of pleading for any thing but a distress. You may, therefore, consider whether he intended what he did as a distress, by seeing whether he confined himself to it. Now, it seems, that he did more, for he put up a bill in the window. I think that, being in to make the distress, he might put up the bill without creating a new trespass. If you are not perfectly satisfied that the intention was to make a distress, and that the policeman was introduced for the purpose of the distress, and was necessary for that purpose, you must find your verdict for the plaintiff.

Verdict for the plaintiff—Damages 1s.

Atcherley, Serjt., and *Payne*, for the plaintiff.

Wilde, Serjt., and *Wildman*, for the defendant.

[Attornies—*Sadgrove*, and *Blunt & Co.*]

(a) See the case of *Swann v. The Earl of Falmouth*, 2 M. & R. 534, where the landlord's agent walked round a wharf, and left a notice that he had distrained goods lying there for rent, and that they would be appraised and sold if not

replevied, &c.; and then went away without leaving any one in possession. And it was held, in case for an excessive distress, to be an actual seizure, and no abandonment as between landlord and tenant.

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First Sitting in London, in Hilary Term, 1835.

BEFORE MR. JUSTICE VAUGHAN.

PHILLIPS v. BARLOW.

Jan. 16th.

DEBT on a bail-bond.—The plea upon which issue was joined stated that the bond “was not, at any time before the commencement of the suit, assigned by the sheriff, by indorsement in writing made thereon, and attested under the hand and seal of the said sheriff, in the presence of two credible witnesses, according to the form of the statute in such case made and provided.”

It is sufficient, under the stat. 4 & 5 Ann. c. 16, s. 20, if the assignment of a bail-bond by the sheriff be executed in the presence of two witnesses, and it need not be attested by them as subscribing witnesses.”

It appeared, that the assignment of the bond was executed in the presence of two witnesses; the signature of both as having witnessed the execution appeared on the production of the bond at the trial; but it was proved that one only had signed at the time, and the other did not affix his name until after the action was brought.

S. Martin, for the defendant.—I submit that what was done is not sufficient. The enactment of the statute 4 & 5 Ann. c. 16, s. 20, is, that the sheriff shall assign the bail-bond, “by indorsing the same, and *attesting* it under his hand and seal, in the presence of two or more credible witnesses.” The question is, whether the word “attesting” does not apply to the witnesses as well as to the sheriff.

VAUGHAN, J.—I am of opinion that there has been a sufficient compliance with the statute. If there is any doubt about it, it can be set right elsewhere. It is much better that the names of the witnesses should be written down at the time, because it enables the party to apply to them, and ascertain the fact, and find out who and what they are; but I do not think it is necessary.

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S. Martin applied for leave to move, if on consideration there should appear ground for doing so.

VAUGHAN, J.—I cannot give you any leave to move, because I do not entertain any doubt upon the subject.

Verdict for the plaintiff.

Andrews, Serjt., and *Hoggins*, for the plaintiff.

S. Martin, for the defendant.

[Attornies—*Cutten*, and *James*.]

First Sitting at Westminster, in Hilary Term, 1835.

BEFORE MR. JUSTICE GASELEE.

WOODS v. POPE.

Jan. 22nd.

If a tenant, who is bound to repair, leave, and at the end of the tenancy the premises be out of repair, the jury may give the landlord, in an action against the tenant, not only the amount of the actual expense of the repairs, but also a compensation for the loss of the use of the premises while they were undergoing repair.

ASSUMPSIT by the plaintiff, as the landlord, against the defendant, as the late tenant of certain premises situate at Prince's Wharf, in the parish of Lambeth, for non-repair, and also for leaving the premises out of repair. Plea—that the sum of 59*l.* 6*s.* had been paid into Court, and that the plaintiff had sustained no damage beyond that sum. Replication—that the plaintiff had sustained damage beyond the sum of 59*l.* 6*s.* (a).

It was proved that the defendant was liable to repair the premises, and that he had left them out of repair; and it was not disputed that the sum paid into Court was the sum expended by the plaintiff in putting the premises in repair.

(a) For the forms of pleadings of this kind, see ante, p. 712, n.

Atcherley, Serjt., for the plaintiff.—I submit, that, as the defendant did not keep the premises in repair during his tenancy, as he ought to have done, and left them out of repair, the plaintiff is entitled to recover, not only the actual expense of the repairs, but also a compensation for the loss of the use of the premises for a reasonable time during which the plaintiff had them under repair.

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Humfrey, for the defendant, contended that the plaintiff could not recover any thing beyond the amount actually paid for the repairs, and that the money paid into Court was therefore sufficient.

GASELEE, J.—It is a new point. I shall leave it to the jury, and give Mr. *Humfrey* leave to move to enter a nonsuit.

Verdict for the plaintiff—Damages, 1*l.* 15*s.*,
being for the loss of the use of the premises
while they were under repair.

Atcherley, Serjt., and *Chandless*, for the plaintiff.

Humfrey, for the defendant.

[Attornies—*Selby*, and *Fowler*.]

ON a subsequent day, *Humfrey* moved in pursuance of the leave given; but the Court refused a rule.

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COURT OF KING'S BENCH.

*Trial at Bar.—Vacation after Hilary Term, 1835.*BEFORE LORD DENMAN, C. J., MR. JUSTICE LITTLEDALE, MR.
JUSTICE PATTESON, AND MR. JUSTICE WILLIAMS.Feb. 13th.

REX v. ANTROBUS, Esq.

A sheriff is not bound to execute a criminal who is sentenced to death in his county, if such criminal is not in his custody; and if it is intended by the Court which passed the sentence that the sheriff should do execution, there should be a special mandate to the party having the prisoner in custody to deliver him to the sheriff, and another to the sheriff to receive the prisoner, and execute him.

On a question whether, by custom, a sheriff of the county is exempt from the duty of executing criminals in his county, and whether, by custom, the sheriffs of a city are bound to do it, evidence of reputation is not receivable.

On the trial of an information against a sheriff for refusing to execute a criminal, the warrant to a former sheriff commanding him to gibbet an offender, and a craving by that sheriff of an allowance of his expenses in so doing, which were allowed by the Chancellor of the Exchequer, are receivable in evidence.

INFORMATION by the late Attorney-General (Sir *J. Campbell*), which, in the *first* count, stated, that, at the assizes and general gaol delivery holden at Chester, in and for the county of Chester, on the 6th of August, 5 Will. 4, before Mr. Justice *Vaughan* and Mr. Baron *Parke*, it was presented by the grand jury, that James Garside and Joseph Mosley had killed and murdered Thomas Ashton, by shooting him with a pistol (setting forth the indictment), and that then and there, before the said Justices, "came the said J. G. and J. M., under the custody of John Dunstan, constable of the castle of Chester, in the county aforesaid, to whose custody in the gaol of the county aforesaid, for the cause aforesaid, they had severally been before committed, and being brought to the bar in their respective proper persons by the said constable, to whom they were then also committed, and forthwith," to wit, on &c., and being demanded concerning the premises, said that they were not guilty. The information then went on to state the trial and conviction of James Garside and Joseph Mosley, and stated the judgment to be, that "it was considered, ordered, and adjudged by the said Court there, that the said J. G. and J. M. should be taken from thence to the prison from whence they came, and that

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they should be taken from thence to a place of execution on Friday then next ensuing, being the 8th day of August, in the fifth year of the reign aforesaid, and that they should be there hanged by the necks respectively, until their bodies were dead, and that their bodies, when dead, should be taken down, and be buried within the precincts of the said prison, or of any prison in which they should have been confined after their said conviction." The information proceeded to state, that the defendant was the sheriff of the county of Chester, and that it was his duty, as such sheriff, by virtue of the said office of sheriff, "to execute the said judgment and sentence of death upon the said J. G. and J. M. according to law; of all which said premises the said Gibbs Crawford Antrobus had notice." It then stated that the defendant, having "due notice of the judgment and sentence of death," was, on the 7th of August, duly required to execute the said judgment and sentence of death upon the said J. G. and the said J. M. on the said 8th day of August in the year aforesaid, pursuant to the said sentence; but that the defendant, wrongfully neglecting his duty as such sheriff, "wholly refused and neglected, notwithstanding he was so required as aforesaid to execute the said judgment and sentence of death upon the said J. G. and J. M. on the said 8th day of August, or at any other time, and hath hitherto wholly refused and neglected so to do." The *second* and *third* counts were similar, except that they stated the conviction of James Garside and Joseph Mosley more concisely. Plea—Not guilty.

F. Pollock, A. G., for the prosecution, in his opening, said—The question is, whether it is the duty of the defendant, as sheriff of the county of Chester, to obey the orders of the Judges for the execution of criminals in that county. The duty of a sheriff at common law is to obey all the lawful commands of the Judges who are presiding in the Courts held for his county, and to him belongs the

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execution of the sentences of those Courts. In ordinary cases, time and place form no part of the sentence; yet the Court may, if the case require that interposition, call upon the sheriff to perform his duty at any time, and at any place within his jurisdiction. This is perfectly clear; and not many years since, a person, who was convicted of a felony committed at Mr. Beckwith's on Snow Hill, was executed at that place by order of the Court. For many years, the sheriff of the county of Chester has not executed criminals, that duty having been performed as far back as living memory will go by the sheriffs of the city of Chester. The form was, for the Judges of the Court of Session of the county palatine of Chester, by a rule, to order the sheriffs of the city to execute the criminals, they being taken by the constable of the castle of Chester (which is in the county) to the boundary of the city, and then delivered to the sheriffs of the city, who executed them within their jurisdiction; but when any person was ordered to be hanged in chains in any distant part of the county, the sheriff of the county was then a party to the transaction, and his officers were the persons by whom the offender was hanged in chains. It is quite clear, that the sheriffs of the city were within the palatinate jurisdiction, and might be ordered by a rule of the Court of the county palatine to do execution upon criminals; and from this it might have been supposed that the sheriffs of the city were bound to execute criminals convicted in the county. As this is a walled town, and near the borders of Wales, it might have been expedient in ancient times that executions should always take place in the city. In the year 1830, the stat. 11 Geo. 4 & 1 Will. 4, c. 70, was passed. By sect. 14 of that statute, all the Courts which had exercised jurisdiction in the county palatine of Chester are abolished; and, by sect. 19, the county of Chester is placed on the same footing, as to commissions of assize and oyer and terminer, as any other county which is not a county palatine. I should therefore submit, that, if the sheriff was not bound before

to execute criminals, he would be now under the provisions of this statute. It is true, that, since the passing of this statute, on one or two occasions, persons convicted in the county have been executed by the city sheriffs in the old mode of proceeding, an order having been made upon them for that purpose by the Judges. But by what means the Judges of oyer and terminer for the county of Chester acquired jurisdiction over the sheriffs of the city, I know not. That the Judges of the old palatinate Court had jurisdiction over the sheriff of the county, and also over the sheriffs of the city, I am aware; but that would not apply to the Judges of oyer and terminer. However, at length, a doubt arose, whether the sheriffs of the city owed any allegiance to the Judges of oyer and terminer, who acted under a commission for the county, and that doubt has given rise to the present prosecution. It is true, that, by sect. 15 of the statute, the rights and obligations of the mayor and citizens of Chester, "in the Courts of the county of the city of Chester, *or otherwise*," are saved; but, according to all the rules of construction, the jurisdiction of a Court superior to those mentioned in the section could not be controlled by the words "or otherwise (a)."

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The record of the conviction of the prisoners, James Garside and Joseph Mosley, was read by Mr. Dealtry, it having been removed into this Court by *certiorari* (b). In this record, the statement of the custody of those prisoners and of the judgment were exactly the same as they were stated in the information.

On the part of the prosecution, Mr. Lloyd, the clerk of assize for the Chester Circuit, was called. He said—"I was at the trial of James Garside and Joseph Mosley. The defendant was present. I produce the calendar signed by Mr. Baron *Parke*. I gave a copy of it signed by

(a) See the case of *Ex parte Hill*, ante, Vol. 3, p. 225.

(b) See 4 Nev. & M. 33.

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myself to the defendant (a), who declined to execute the prisoner, and gave me a letter to Mr. Baron *Parke*, who on reading it granted a respite."

The letter was read; and in it the defendant stated, that he considered that it was not his duty to execute criminals, and that no sheriff of Cheshire had ever done so.

Mr. Lloyd in his cross-examination, said—"Both at the trial and afterwards the prisoners were in the custody of the constable of the castle of Chester; the Court and the gaol are both in the castle, which is considered to be in the county, though a person cannot get to it except by going through the city. The constable has the sole government of the castle. He is a patent officer appointed by the crown for life. There are two sheriffs of the city, one of them appointed by the mayor and the other by the freemen. Before I served the defendant with a copy of the calendar, I had served an order on the constable of the castle, and on the two city sheriffs; and, on their refusing to execute the prisoners, I went to Mr. Baron *Parke*, and was directed by him to serve the defendant with a copy of the calendar. The constable of the castle has the exclusive custody of county prisoners, and the execution used to take place at the New City Prison. Before the statute which has been referred to, the warrant for an execution used to be to the city sheriffs and the constable of the castle, but never to the county sheriff. The sheriff of the county used then to hear the sentence, but then (as now) he had not the custody of the prisoners."

It appeared, that, in the year 1812, a special commission

(a) A question was raised, whether the defendant ought not to have had notice to produce the copy of the calendar which had been delivered to him; but it was ultimately produced by the defendant's counsel, although no notice had been given, the Attorney-General consenting to make certain admissions if necessary.

had been issued for the trial of certain rioters, directed to Robert Dallas, Esq., and Thomas Burton, Esq., (the then Judges of the Chester Circuit), and that Mr. Knapp acted as clerk to that special commission, and that the order for the execution of some of the rioters was directed to the sheriffs of the city and to the constable of the castle. This, it appeared, was a special commission, and not a special Session, as Mr. Knapp had never held any office connected with the Court of Session at Chester.

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Maule, for the defendant, proposed to ask Mr. Lloyd the following question:—"Have you heard old persons in Chester say, that the sheriff of Cheshire is exempted from the execution of criminals?"

Lord DENMAN, C. J.—I think that this is not a case in which evidence of reputation is admissible.

Maule.—I submit that I may shew an immemorial custom on this subject; and that, as it is a matter of a public nature, I may go into evidence of reputation.

Kelly, on the same side.—I submit that this relates to a public right. The defendant means to assert, that, by immemorial custom, the sheriffs of the city of Chester are bound to execute criminals, and that they are the only persons at Chester who are bound to do so. The public have all an interest in the administration of justice. We have already the fact proved that the sheriffs of the city discharged this duty as far back as living memory will go, and we wish to carry it further by the statements of persons deceased. In the case of *Morewood v. Wood (a)*, Lord *Kenyon* said, "Evidence of reputation upon general points is receivable, because, all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects,

(a) 14 East, 327, n. (a).

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and that they should discourse together about them, having all the same means of information."

PATTESON, J.—This is more like the case of a charge cast upon a person *ratione tenuræ*. Did you ever know of reputation being given in evidence in such a case as that? Suppose a county were indicted for the non-repair of a bridge, and their defence was, that a particular person was bound to repair it *ratione tenuræ*; is there any instance of reputation being given in evidence in such a case? Mr. *Kelly* puts it as a custom that the sheriffs of the city should execute criminals. That is throwing the burden off the county sheriff, who is at common law bound to do execution.

F. *Pollock*, A. G.—Reputation is called in to explain acts otherwise inexplicable. But here we have the sheriffs of the city obeying the rule of a Court which they were bound to obey, the superior Courts of the county palatine having jurisdiction over the sheriffs of the city, as well as over the sheriff of the county. This does not shew a custom. Suppose there had been a succession of twenty-one years' leases, would that be evidence of a custom binding the landlord to grant a twenty-one year's lease? It is clear that in every case the Court gave an order, and after that can there be evidence of reputation admitted to shew that the sheriffs of the city were bound by a custom?

Lord DENMAN, C. J.—We think that this question cannot be put. The principle upon which evidence of reputation is received is, that the mass of the people have an interest in the subject on which they state their opinion. That does not apply here.

LITTLEDALE, J.—This is wholly a question of private right, it being whether the sheriff of the county of Chester

is bound to execute criminals, or whether the duty is cast on the sheriffs of the city, who may, perhaps, have an interest in the matter, as they may have a grant of the goods of all felons executed in their city, and therefore derive a benefit from the execution of criminals. The public have no interest in it. Some one must do execution; and, if all others decline, this Court orders it, as was done in this very instance (a).

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PATTESON, J.—I do not think that this is at all a public right.

WILLIAMS, J.—In a case respecting the boundaries of Wem, Mr. Justice *Chambre* allowed evidence of reputation as to the boundaries, but not as to where a particular turnpike gate had stood.

The question was not put (b).

Maule wished to ask Mr. Lloyd, whether he had not heard it reported among old persons at Chester that the corporation were bound to execute criminals.

LORD DENMAN, C. J.—We think that falls within the same rule.

PATTESON, J.—There is no issue whether the city is liable.

The question was not put.

F. Pollock, A. G.—Proposed to put in an examined extract from the bill of cravings of John Arden, Esq., the sheriff of Cheshire in the year 1790, amounting to the sum of 155*l.* 15*s.* 1*d.*, in which (*inter alia*), at the Exche-

(a) See 4 Nev. & M. 33.

(b) See the case of *Talbot v. Lewis*, ante, p. 603.

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quer, he craved to be allowed the expenses of gibbeting a person named John Dean at Stockport Moor in that county, amounting to 84*l.* 8*s.* 3*d.*; upon which cravings a sum of 84*l.* 8*s.* 3*d.* was allowed him in the year 1792 by the Rt. Hon. W. Pitt, the then Chancellor of the Exchequer.

Maule.—I submit that the conviction should be put in.

PATTESON, J.—Is not this a matter of record in the Exchequer?

Kelly.—A claim was made out by the sheriff, but it may be that no execution ever took place.

Sir *J. Campbell*, for the prosecution.—These entries are of record in the Exchequer. The sheriff makes his claim, and it is a judicial proceeding of record, and may be pleaded with a *prout patet per recordum*.

LORD DENMAN, C. J.—Does this shew that the sheriff of the county executed any criminal?

Sir *J. Campbell.*—It is evidence to shew that the county sheriff obeyed the order of the Judge.

PATTESON, J.—Any act of a former sheriff would be evidence against the defendant.

F. Pollock, A. G., proposed to put in the order for the execution of John Dean.

Maule.—I submit that the judgment must be produced.

PATTESON, J.—Is the record here?

F. Pollock, A. G.—No, my Lord, we have the minute-book.

PATTESON, J.—That is not receivable (a).

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Lord DENMAN, C. J.—But we think that the order is receivable, as shewing that the Court made such an order.

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It was read ; and by it the Judges of the Session ordered the sheriffs of the city to execute John Dean, and the sheriff of the county to hang him in chains.

Kelly.—Does your Lordship think that the Exchequer proceedings are receivable ?

Lord DENMAN, C. J.—Yes.

The order and the extract from the bill of cravings were read.

The order served by Mr. Lloyd on the constable of the castle and the sheriffs of the city was at the desire of the defendant's counsel also read :—It was as follows—

“ To the Constable of the Castle of Chester ;
To the Sheriffs of the City of Chester ;
And to all others whom it may concern.

Whereas, at the Session of Gaol Delivery for the county of Chester, holden at Chester on Saturday the second day of August instant (b), James Garside and Joseph Mosley received sentence of death for murder, the offence in the indictment against them mentioned. Now it is hereby ordered and adjudged, that execution of the sentence be made and done upon them, the said James Garside and Joseph Mosley, on Friday the eighth day of August instant, at the usual place of execution ; and that the sheriffs of the said city of Chester do see that execu-

(a) See the cases of *Rex v. Smith*, 8 B. & C. 341 ; Carr. Supp. 189 ; *Porter v. Cooper*, ante, p. 354 ; and *Rex v. Ward*, ante, p. 366.

(b) The commission-day was the 2nd of August, and these persons were tried on the 6th.

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tion be done in the premises, and that their bodies immediately afterwards, when dead, be delivered into the custody of the said constable of the said castle, and that the said constable do cause the said bodies to be buried within the precincts of the said castle or gaol of the county of Chester, according to law. Dated this seventh day of August, in the year of our Lord one thousand eight hundred and thirty-four.

For the King. By the Court.

Lloyd,
Clerk of Assize and Clerk of the Crown."

Maule, for the defendant.—I submit, that, as the case now stands, there is not sufficient evidence to call upon the defendant to make a defence. The information states, that the prisoners were in the custody of the constable of the castle, and states the judgment respecting them to be, that they should be taken to the place from whence they came, and thence on the 8th of August to a place of execution, to be there hanged, and their bodies to be buried in the castle. This judgment is entire; and the information goes on to state, that it was the duty of the defendant to carry this judgment into effect, and that he did not do so. The allegation of the duty amounts to this, that it was as much the sheriff's duty to take the prisoners to the place from whence they came, and to bury them in the castle after they were executed, as it was to execute them in his bailiwick. Now, even admitting that it was the sheriff's duty to execute them in the county, he certainly was not bound to do all the rest. With respect to the sheriff being bound to execute these persons, it is said that he became bound to do so, by the fact of his having had the calendar given to him. That is no doubt the mode adopted in ordinary cases, because the sheriff is the party in whose custody the prisoner ordinarily is; in the same way, that, if the person is to be imprisoned, the sheriff or his deputy hears the sentence passed, and the person is detained,

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even before any calendar is made out; and the reason for this is, that he has the person already in his custody. It is a clear incident to gaols, that the person who has the custody must execute the offender; and in ordinary cases the sheriff is the person whose duty it is to execute, because he has the gaol. Lord *Hale* says (a), "If the prisoner be in custody of the sheriff, the truth is, that there is no need of any warrant or calendar for the open pronouncing and entering the judgment; *suspendatur* is a warrant for the execution: and so it is in the King's Bench, the entry on the record of the judgment, with a *præceptum est marescallo quod faciat executionem periculo incumbente*, without formal writ or precept of the Court, is sufficient, and more is not usual; and the calendar subscribed by the Judge of gaol delivery is but a memorial." It is in respect of the custody that the sheriff is to do execution, and so it is where execution is ordered to be done by the marshal; and I submit that it must be something more than a memorial which would call upon a person, who has not the prisoner in his custody, to execute him. Lord *Hale* also lays down (b), that, "regularly the officer that is to make the execution is that officer in whose custody by law the prisoner is at the time of the judgment given; for into his custody he is to be remanded after judgment pronounced, and there to stay till judgment executed. Therefore, where judgment is given at the sessions of gaol delivery, the execution is to be made by the sheriff, or his under-sheriff or deputy, for regularly he is in his custody ordinarily; but if the prisoner be in the Tower of London (which is oftentimes the case of persons indicted for great treasons), and he be arraigned before justices of oyer and terminer, he is commonly brought before them by a precept to the constable of the Tower (which is an exempt prison from that of the sheriff); and, if he be convict and attain, he is commonly

(a) 2 H. P. C. 31.

(b) 2 H. P. C. 410.

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remitted thither, and the precept or warrant for execution must go to the lieutenant or constable of the Tower," " but usually a command or precept is made to the sheriffs of London and Middlesex to be assisting the lieutenant." " If the prisoner be arraigned in the King's Bench, either for treason or felony, he is or ought to be always first committed to the marshal, and by him is to be brought to the bar upon his trial and judgment, and to him he is to be remitted after judgment till execution; and wheresoever the felony or treason was committed, yet the marshal is to make execution, for he is in this case the immediate officer to the Court, and the prisoner is not in the custody of any sheriff, but of the marshal. Only in these and the like cases the Court gives order to the sheriff of the county where the execution is made to be assisting to the marshal." If the party is to be executed by any officer in whose custody he is not, there ought to be a warrant from the Court to the officer who has him in custody, to deliver him to the officer who is to execute him, and to the latter officer to do execution; and, in that case, the liability of the latter would begin as soon as the party was delivered into his custody. In Lord *Ferrers's case* there was a writ directed to the sheriffs of London and sheriff of Middlesex, commanding them to receive Lord Ferrers from the lieutenant of the Tower, and to execute him; and another writ to the lieutenant of the Tower to deliver him up to the sheriffs (a). In the city of Chester it appears, that, before the stat. 11 Geo. 4 & 1 Will. 4, c. 70, the proper course was pursued, namely, to send a warrant to the constable of the castle to deliver up the prisoner to the sheriffs of the city, and for them to execute him.

PATTESON, J.—Were those warrants addressed to the constable, as well as to the city sheriffs?

(a) The form of one of these writs will be found 4 Black. Comm. App. VII.

Maule.—Yes, my Lord. That was the proper order; it commanded each officer to do that which it was needful for him to do.

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LITTLEDALE, J.—It would always have been the more formal mode to have done it by *habeas corpus* to one officer to give up the prisoner, and for the other to receive him; but it certainly may be done by warrant.

Maule.—The Tower of London is not the prison of the sheriffs of London or sheriff of Middlesex, but of the constable of the Tower; and whenever the sheriffs of London or sheriff of Middlesex are to do execution on a prisoner who is in the Tower, the sheriffs are not to take upon themselves the execution of the whole judgment, but to have a special mandate to perform a particular part of what is required by the judgment; and to make the defendant liable in this case, there should not only have been an order calling on the defendant to do execution, but also an order to the constable of the castle to deliver the prisoners up to the defendant.

PATTESON, J.—You assume that the constable of the castle is not the gaoler of the sheriff; your argument is grounded upon that?

Maule.—Certainly—that is so.

PATTESON, J.—I see it stated on the record that the prisoners were in the custody of the constable of the castle. If the constable had been the mere servant of the sheriff, it would have been stated that they were in the custody of the sheriff.

Maule.—The defendant could not lawfully have got possession of the prisoners unless the constable of the castle had delivered them up to him; now the Judge had

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ordered him to deliver them up to the sheriffs of the city, and that order remained unrevoked. The defendant had notice of the judgment; and it is now made matter of charge against him that he did not go to the constable of the castle, and try to get the prisoners into his custody, in contravention of an order that they should be delivered into the custody of the sheriffs of the city.

Kelly, on the same side.—The presence of the sheriff at the trial and the delivery of the calendar may be sufficient in ordinary cases, because the gaol is the gaol of the sheriff, and the judgment calls properly on him to execute the prisoner, if the prisoner is in his custody; but the moment that it appears that a prisoner is in the custody of some other officer known to the law, the ordinary rule does not obtain, and there must be an order to the person in whose custody the prisoner is to deliver him up, and to the sheriff to execute him. These very prisoners were brought into this Court by a writ of *habeas corpus*, directed not to the sheriff, but to the constable of the castle, which is an admission on the part of the Crown that they were in the exclusive custody of the constable of the castle. They were placed by this Court in the custody of the marshal, and this Court did not order that the sheriff of Surrey, in whose county they were, should execute them, but that they should be executed by the marshal, into whose custody they had been committed.

LITLEDALE, J.—If a debtor escapes out of the castle at Chester, whom is the action brought against? The constable or the sheriff?

Kelly.—The constable. In this case the only order given to the defendant was the calendar, and he had thereby no authority to go to the castle and demand the prisoners; and, if he had gone there, what was the situation of the constable? The only order which he had

received was to deliver the prisoners to the sheriffs of the city; and he would have been guilty of a breach of his duty if he had delivered the prisoners to any one else.

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Welsby, on the same side.—If it is to be contended that the sheriff's being present at the trial made him liable to execute the prisoners, I submit that that is clearly not so, because the prisoners were not in his custody; and if they were in any other custody, there should be a writ or precept to the person in whose custody they were to deliver them up to the sheriff. If it is to be said that the delivery of the calendar was sufficient to charge the defendant, there is also the fact that there was an order which remained unrevoked, which directed the constable of the castle to deliver the prisoners to the sheriffs of the city.

F. Pollock, A. G.—With respect to the first point, it is said that the judgment includes several particulars which the defendant could not perform; but I apprehend, that, if he was bound to perform a part only, and that part he did not perform, he is still liable on this information for a breach of his duty, as the allegation is divisible. With respect to the other point; if, as the prisoners were in other custody, it was necessary, in point of form, that there should have been a *habeas corpus*, or a special order, for the prisoners to be delivered up to the sheriff, I admit, that, as the learned Baron did not take that step, this prosecution must fail. However, it is only by assuming that that is essential that the present objection can be sustained. But I mean to submit that it was only necessary that each party should have notice, and that he should then perform his duty; and, if that be so, I think that the case is made out. It should be observed, that the order which has been produced does not direct the constable to deliver up the prisoners to any one, it merely informs him of the judgment, and gives him notice to do his duty; and if the

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act of Parliament has made it the defendant's duty to execute the prisoners, and the defendant had come and demanded the prisoners, the constable of the castle would have been bound to have delivered them up, and the mistake of the Judge, if mistake it were, in inserting in the order that the sheriffs of the city should see execution done would be matter of excuse, but no answer to this information in point of law. If the defendant had the duty of executing these prisoners, the case stands thus: the constable of the castle had distinct notice of the sentence, and he is not ordered to do any thing. There is an order upon the city sheriffs; but if they had no legal liability, the constable ought not to have attended to that order, and would have been justified in delivering the prisoners to the defendant.

LITLEDALE, J.—The prisoners were never in fact delivered to the custody of the defendant.

F. Pollock, A. G.—He did not demand them; and, instead of going to the castle to do so, he says that he is not bound to execute them, and that, as I submit, brings upon him the charge of neglect of duty.

Sir J. Campbell.—The first objection is, that this sentence consists of three parts, two of which could not be carried into effect by the defendant. If this was a thing that could not be divided, this objection must prevail; but, in this case, we have only to prove so much as shews that the defendant has been guilty of a breach of his duty; and this allegation may be taken *divisim*. With respect to the other objection, I submit that there is abundant evidence that there was a neglect of duty by the defendant, although there was no warrant served upon him. The calendar was delivered to him, and he said that he would not execute the prisoners. That is, as it appears to me, abundant evidence that he would not proceed to carry the sentence into effect.

LITTLEDALE, J.—You do not charge in this information that the defendant did not endeavour to get the prisoners into his power.

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Sir *J. Campbell*.—I submit that there was no necessity for any warrant, either to the defendant or the constable of the castle. The warrant to the city was a nullity, and that cannot prejudice the present prosecution. It is admitted that the delivering of the calendar would have been sufficient, if the prisoners had been in the custody of the defendant; but it is said, that, as they were in other custody, a warrant was necessary. That distinction I deny. Anciently a warrant was considered necessary in all cases; but for centuries the calendar only has been made out, and no warrant issued. Mr. Justice *Blackstone* (a) lays it down broadly, that the calendar answers all the purposes of a warrant; and Lord *Hale* says (b), that Lord *Rolle* would never sign any calendar, and that he gave his judgments *viva voce*. When the defendant received the calendar, he was bound to demand the prisoners of the constable of the castle, and, if the constable of the castle would not deliver them up, that would have been matter of excuse for the defendant.

Wightman, on the same side.—The constable of the castle is informed that these prisoners are to be executed on the 8th of August, and it therefore became his duty to deliver them up to the person who was by law authorized to receive them; and, if the defendant had gone and demanded them, the constable would have been guilty of a breach of his duty, if he had not delivered them up. We say that it was the defendant's duty, on receiving the signed calendar, to have gone to the castle and demanded the prisoners; and we say that the calendar was equivalent to a formal order; indeed, the

(a) 4 Com. ch. 22.

(b) 2 H. P. C. 31, 410.

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son in whose custody the prisoners are is the person to do execution; but, as the sheriff is the officer who usually does execution, the regular way would be to issue a *habeas corpus* to the constable of the castle to deliver up the prisoners, and another to the sheriff to receive them and to execute them. Perhaps it might be done in another way: the constable of the castle and the sheriff of the county are both bound to be present in Court, and the Court might make a special order that the constable should deliver up the prisoners, and the sheriff receive them and execute them. It is said that the delivery of the calendar to the defendant had this effect; but it should be observed, that an order had also been served on the constable of the castle and on the city sheriffs, and, so far from this being an order upon the sheriff of the county, it directed the execution to be done by the sheriffs of the city. It is said that this order is a nullity, and I will take it to be so; and that afterwards a copy of the calendar was served on the defendant. Still the prisoners are in the custody of the constable of the castle, and the defendant could not execute them till they were legally in his custody. It is true that the defendant might have demanded them, but still the constable of the castle might not have been bound to give them up. It may be, that the sentence passed in Court might be in such a form as to give notice to the constable to deliver and the sheriff to receive; but, if the custody were intended to be changed, it should be by a special order of the Court, stating how the sentence was to be carried into effect. It is true that the defendant has refused to carry this sentence into effect; but, to make that refusal criminal in him, he must have had the power of carrying it into effect. The case of the Tower of London is very similar to the present; and I think that a sheriff is not called upon to execute a prisoner till he has been legally in his custody.

PATTESON, J.—There is great doubt as to who is the person bound to execute criminals in Cheshire; but it is

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sufficient for the present purpose to consider that the present defendant is in the same situation as the sheriff of any other county would be. We find it laid down by Lord *Hale*, that, *primâ facie*, the person to do execution is the person who has the prisoner in his custody. That, it appears, the defendant in this case had not; and it comes to this question, whether a sheriff, who has not the custody of the gaol, or of the prisoners therein, is bound to do execution? In all cases the judgment of the Court gives the power; and, if the sheriff has the prisoner in his custody, no document at all is necessary to authorize the execution. The ancient practice was to have a warrant in every case, but the general practice now is to have a calendar only; and Lord *Hale* says, that this calendar is a mere memorial, and that such a memorial is not necessary when the prisoners are in the custody of the sheriff. It has been contended that the calendar is more than a memorial. I confess I cannot see that it is. This is not a calendar in the same form as that which is presented to the Judge when he comes into an assize town, but is a new document, containing a list of names and sentences, and not even stating in whose custody the prisoners are. I think it is a mere memorial. Things so standing, is there any authority to shew that a person not in the custody of a sheriff can be executed by him without a warrant, or some mandate in writing? Lord *Hale* puts the case of the Tower, and this case is as like that as it can be. It may be, that the constable of the castle of Chester should execute, and the sheriff be assisting; but I do not say that the sheriff, as he is the officer of the Judges of gaol-delivery, should not himself do execution; but then the sheriff must have the party in his legal custody, which is not the case here.

WILLIAMS, J.—It is clear, from the record of conviction of the prisoners in the Court below, that the prisoners were not in the defendant's custody; and when they were

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brought into this Court, the writ of *habeas corpus* was directed to the constable of the castle. That being so, the question is raised; and we must now see whether any case can be adduced as shewing an instance where any person was ever called upon to do execution without having the prisoners in his legal custody. The cases, as well those which were cited to-day, as the numerous authorities cited on a former occasion (a), shew that the person to do execution must then have the party in his legal custody. In the case of Mr. Ratcliffe, there was a writ to put the party into the legal custody of the person who was to do execution. Now, in the present case, was there any thing that gave the defendant the right of having the legal custody of the prisoners? On the part of the prosecution the order has been relied upon; but that, if it operated at all, was to deliver the prisoners into other custody, namely, into the custody of the sheriffs of the city. It is true that the defendant was served with the calendar, which is a mere memorial, and is neither more nor less than a memorial, and it has no other operation. It is said that one learned Judge would never sign any calendar; but that was in cases where the prisoners were in the custody of the sheriff. I think, that, in the present case, the defendant had not the custody of the prisoners, and that he had not a clear authority or duty to get them into his custody. I am of opinion that there is nothing in this case to go to the jury.

Lord DENMAN, C. J., directed an acquittal.

Verdict—Not Guilty.

F. Pollock, A. G., *Follett*, S. G., *Sir J. Campbell*, and *Wightman*, for the prosecution.

Maule, *Kelly*, and *Welsby*, for the defendant.

[Attornies—*Maule & B.*, and *G. F. Hudson*.]

(a) See 4 Nev. & M. 33.

PROMOTIONS.

IN the vacation after Trinity Term, 1834, *F. Thesiger*, Esq., was appointed one of his Majesty's counsel learned in the law ; and *M. D. Hill*, Esq., received a patent of precedence, to take rank next after *F. Thesiger*, Esq. In the same vacation *W. Erle*, Esq., and *C. Cresswell*, Esq., were appointed his Majesty's counsel learned in the law.

In the same vacation Sir *C. C. Pepys*, Knt., was appointed Master of the Rolls, *vice* Sir *J. Leach*, Knt., deceased.

In Michaelmas Term, 1834, *R. M. Rolfe*, Esq., was appointed Solicitor-General, *vice* Sir *C. C. Pepys*, Knt.

In the same term, *R. Preston*, Esq., was appointed one of his Majesty's counsel learned in the law.

On the 21st of November, Lord *Brougham* resigned the great seal, and on the same day Lord *Lyndhurst*, C. B., was appointed Lord Chancellor ; but continued to sit in the Court of Exchequer as Lord Chief Baron till the end of Michaelmas Term, and occasionally during the sittings after it.

In the same vacation the following promotions were made :—*F. Pollock*, Esq., was appointed his Majesty's Attorney-General, *vice* Sir *J. Campbell*, Knt. *W. W. Follett*, Esq., was appointed his Majesty's Solicitor-General, *vice* *R. M. Rolfe*, Esq. Sir *J. Scarlett*, Knt., was appointed Lord Chief Baron, *vice* Lord *Lyndhurst* ; and was created a peer by the title of Lord *Abinger*.

D. Wakefield, *W. Burge*, *H. J. Shepherd*, *W. Skirrow*, *C. Temple*, *C. H. Barber*, *J. Miller*, *G. Spence*, *T. J. Platt*, *R. Kindersley*, *E. Jacob*, *J. Wigram*, and *F. Kelly*,

PROMOTIONS.

Esquires, were appointed his Majesty's counsel learned in the law.

In Hilary Term, 1835, *J. T. Coleridge*, Esq., Serjeant-at-law, was appointed one of the Judges of the Court of King's Bench, *vice* Sir *W. E. Taunton*, Knt., deceased.

I N D E X

TO THE

PRINCIPAL MATTERS.

ABORTION.

Semble, that, so far as the nature of the thing administered is concerned, the question on an indictment on the stat. 9 Geo. 4, c. 31, s. 13, is a question of the intention of the party administering it, and not of the noxious or innoxious character of the article itself. *Rex v. Coe*, 403

ACCESSARY.

See PRINCIPAL AND ACCESSARY.

ACCOMPLICE.

1. If an accomplice be confirmed only as to collateral facts, which do not connect either the accused with the offence, or the accused and the accomplice together, it is not sufficient. *Rex v. Addis*, 388

2. Proving by other witnesses that a robbery was in fact committed, in the mode in which an accomplice states it to have been committed, is not such a confirmation of the accomplice as is required to warrant a conviction on his evidence. *Rex v. Webb*, 595

ACCOUNT STATED.

It was agreed that the trial of an indictment at the Sessions should be postponed, the defendant agreeing to pay the costs of the day. The costs

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were taxed; and, at the subsequent Sessions, the counsel for the prosecution asked if there was any objection to the amount? The defendant's counsel said there was not, except as to 1*l.* 9*s.* The attorney for the prosecution said he would give up that sum, and the defendant's attorney said he would give a check for the residue. After this, the defendant was applied to for payment, and he said his attorney, who received his rents, would arrange it:—*Held*, that the indorsement on the brief was an agreement, and, also, that on this evidence the plaintiff could recover the amount of the taxed costs, minus 1*l.* 9*s.*, on the count upon an account stated. *Porter v. Cooper*, 354

ADULTERY.

1. In an action for criminal conversation, where the adultery was committed on board a ship during a voyage, a witness may be asked on the part of the plaintiff, whether the wife did not keep a journal, and whether she stated for what purpose she kept it. *Jones v. Thompson*, 415

2. In an action for crim. con., evidence on the part of the plaintiff to shew the amount of the defendant's property is not admissible; but, in an

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action for a breach of promise of marriage, it is otherwise. *James v. Biddington*, 589

AGREEMENT.

See UNDERTAKING.

AMENDMENT.

See DEBT, 2, 4.—EJECTMENT, 3.—JURY, DISCHARGE OF, 1.—USE AND OCCUPATION.

1. In an undefended cause, in which a promissory note was declared on as a bill of exchange, the Judge, at the trial, allowed the declaration to be amended; and also ordered, that the Judge's order for the defendant to admit the handwriting of himself and of the indorsers should also be amended. *Moilliet v. Powell*, 233

2. In general, the Judge at Nisi Prius will amend any variance which does not go at all to affect the matter really in dispute between the parties, and which was not likely to mislead the opposite party. Therefore, where a general warranty of the soundness of a horse was declared on, and a warranty "except in one foot" was proved, the Judge allowed the declaration to be amended, the real dispute between the parties being whether the horse was a roarer. *Hemming v. Parry*, 580

3. In trespass for taking "mirrors and handkerchiefs," the defendant justified the taking of the mirrors; but by mistake omitted to justify the taking of the handkerchiefs:—*Held*, that this omission could not be amended on the trial. *John v. Currie*, 618

APOTHECARY.

1. Practising as an apothecary is the mixing up and preparing medicines, prescribed either by a physician or any other person, or by the apothecary himself. *Woodward v. Ball*, 577

2. The acting as a surgeon or accoucheur is not practising as an apo-

ASSAULT WITH INTENT &c.

thecary; nor would the party supplying medicine to a friend be so. But if the party *sought his living* by practising as an apothecary, that is sufficient, as it is not essential that he should have gained his whole livelihood by his practice. *Ibid.*

3. Form of pleadings. *Ibid.*

ARSON.

See BURNING.

ASSAULT.

See FALSE IMPRISONMENT.—MISDEMEANOUR. — SHIPPING, 4, 5.—TRESPASS.

1. If a party be charged before two magistrates with an assault, and they dismiss the complaint, giving him a certificate under the stat. 9 Geo. 4, c. 31, s. 27, he cannot avail himself of this certificate as a defence to an action for the same assault, unless it be specially pleaded. *Harding v. King*, 427

2. If, in an action for an assault, the defendant plead, that he was possessed of a public-house in which the plaintiff was making a disturbance, and that the plaintiff refusing to depart the defendant laid hands on him, and turned him out; this plea is proved if it be shewn, that, in consequence of the plaintiff's refusing to go, the defendant assaulted him with a view of turning him out of the house, though in fact the defendant could not succeed in turning the plaintiff out of the house. *Moriarty v. Brooks*, 684

3. If A. comes up to attack B., and B. puts himself into a fighting attitude to defend himself, this is not an assault by B., and will not, in an action by B. against A. for an assault, support a plea of *son assault demesne*. *Ibid.*

ASSAULT WITH INTENT TO ROB.

1. If a person with menaces demand a sum of money of another, and

that other does not give it to him because he has it not with him, this is a felony within the stat. 7 & 8 Geo. 4, c. 29, s. 6; but if the person demanding the money knows that the money is not then in the possession of the party, and only intends to obtain an order for the payment of it, it is otherwise. *Rex v. Edwards*, 515

2. A. was decoyed into a house and chained down to a seat, and compelled to write an order for the payment of money and an order for the delivery of deeds. The paper on which he wrote remained in his hand half an hour, but he was chained all the time:—*Held*, that this was not an assault with intent to rob within the stat. 7 & 8 Geo. 4, c. 29, s. 6. *Rex v. Edwards*, 521

ASSIGNMENT.

See BANKRUPT, 6, 7.

1. A., expecting an execution, executed a deed assigning all his property to trustees, for the benefit of all his creditors, after paying expenses, with a power to the trustees to retain money to pay the costs of an action which had been brought by J. S. against A. This deed was executed at 9 A. M. on the 25th of February. A writ of *f. fa.* was delivered to a sheriff's officer on the 24th, and by him delivered to the under-sheriff at 10 A. M. on the 25th:—*Held*, that the deed was good, notwithstanding the proviso to retain, and that the goods could not be taken under the *f. fa.* *Bowen v. Bramidge*, 140

2. If A., being in custody on a charge of felony, convey all his property in trust for his wife for life, and then in trust for his son, and on the next day A. be convicted of the felony, this conveyance will be void as against the crown. *Morewood v. Wilkes*, 144

ASSUMPSIT.

See CREDIT, TO WHOM GIVEN.

ATTORNEY.

See EXECUTORS AND ADMINISTRATORS, 6.—INSOLVENT, 1.

1. In an action on an attorney's bill, it is not necessary to give notice to produce the original bill delivered to the party, but the production of a duplicate thereof is sufficient. And it is not necessary that the parties examining should read the two bills alternately. *Fyson v. Kemp*, 71

2. The prudent course for attorneys, when they enter into any arrangement with an opposite party, is to draw up a memorandum of the terms agreed upon and read it over to the party, and let him sign it. *Greenwood v. Eldridge*, 128

3. An attorney, who has commenced an action for his client, has a right to refuse to go on without an advance of money on account, provided he gives his client sufficient notice of his intention to enable him to make the required provision. *Lawrence v. Potts*, 428

4. If an attorney has *reasonable and probable grounds* for commencing an action, and desists from prosecuting it, because he *afterwards* discovers that the cause cannot be successfully proceeded with, he is entitled to recover his costs from his client. *Ibid.*

5. An agreement was entered into between A. and B. B. died, and administration of his effects was granted to C., his daughter. D., who was a friend of C., employed the same attorney who had prepared the original agreement to prepare an agreement between him and C., by which he was authorized to bring an action against A. on the original agreement in C.'s name, and also to instruct the attorney to bring such action. The action was brought, and, after argument on demurrer, the original agreement was declared void, on the ground of champerty; but it appeared that the attorney, on his preparing the original

agreement, consulted a conveyancer, who gave it as his opinion that the agreement was valid:—*Held*, at Nisi Prius, that the attorney was entitled to recover from D., his employer, the costs of preparing the second agreement, and the costs of bringing the action upon the first agreement. *Potts v. Sparrow*, 749

AUCTION.

See BEGIN, RIGHT TO, 7.—PLEADING, 4.

1. If a party has given a bill of exchange or check for the amount of a deposit on a sale by auction, any ground on which the party could recover back his deposit, if paid in money, will be a good ground of defence in an action upon the bill or check. *Mills v. Oddy*, 728

2. Whether, on a plea that a check was given without consideration, the defendant can insist that the check was given for the amount of a deposit on a sale by auction, which sale was void; and whether, if he cannot, the Court would give judgment on the stat. 3 & 4 Will. 4, c. 42, s. 24—*quære?* *Ibid.*

AUTREFOIS CONVICT.

1. The Court will not reject a plea of autrefois convict, on account of the informal manner in which it is handed in by the prisoner; but will assign counsel to put it into a formal shape, and postpone the trial, to give time for its preparation. *Rex v. Chamberlain*, 98

2. A plea of autrefois convict can only be proved by the record; and the indictment, with the finding of the jury, &c., indorsed by the proper officer, is not sufficient, although it appears that no record has been made up. But the Court, before whom the prisoner is brought to be tried the second time, will postpone the trial at the request of the prisoner, on affidavit of the fact, to give time for

an application for a mandamus to compel the making up of the record. *Rex v. Bowman*, 101

3. A plea of autrefois convict stated that the prisoner was indicted, convicted, and sentenced at a session of the peace *duly holden by adjournment on Friday the 5th of July*. The record produced in support of the plea stated that the indictment was found at a session commenced and holden on Monday the 1st of July, and that the Court was adjourned till Tuesday the 2nd; and that the Court, having re-assembled on Thursday the 4th, was adjourned to Friday the 5th, when the prisoner was tried and convicted. It was held that the plea of autrefois convict was not proved by the record, inasmuch as, for want of an adjournment from the Tuesday to the Thursday, the proceedings on the Friday were coram non judice, and therefore a nullity. *Rex v. Bowman*, 337

BAIL.

1. The Judges at the Central Court, after postponement till the next session, on motion for the prosecution, of the presentation of a bill for a capital offence, refused, on motion for the prisoner, to read over very long depositions, to enable them to decide whether they would admit him to bail, although the application was made on the ground that there was not sufficient time to prepare proper affidavits before the breaking up of the Court. *Rex v. Palmer*, 654

2. On bills found at this Court for misdemeanours, forty-eight hours' notice of bail is necessary, unless the application be made on a Friday with a view of detaining the party in custody over Sunday. *Rex v. Carlile*, 628

BAIL BOND.

1. An attorney ought not to prepare a bail-bond for a larger sum than is requisite according to the

BANKRUPT.

practice of the Court. *Wingrave v. Godmond*, 66

2. It is sufficient, under the stat. 4 & 5 Ann. c. 16, s. 20, if the assignment of a bail-bond by the sheriff be executed in the presence of two witnesses, and it need not be attested by them as subscribing witnesses. *Phillips v. Barlow*, 781

BANKER.

1. A. brought an action on the case against the Bank of England (with whom he kept a banking account) for dishonouring, when presented for payment, a bill of exchange he had made payable at the Bank, and laid, as special damage, that C., in consequence of the dishonour of this bill, declined to deal with him. The defendants pleaded, that, at the time of presentment for payment, they had not had sufficient funds in their hands a reasonable time, so as to enable their clerks to know of such funds being in their hands:—*Held*, that, if the bill was left at the Bank at nine o'clock, and called for again at eleven, when it was dishonoured, it must be considered as in a course of presentment until eleven; and that if the Bank had funds at a reasonable time before eleven, and did not pay, they were liable in this action. *Whitaker v. Bank of England*, 700

2. A banker is not bound to pay, after banking hours, a bill which is accepted payable at his house. *Ibid.*

3. The presentment in the evening by the notary's clerk is not a presentment for payment. *Ibid.*

BANKRUPT.

See LANDLORD AND TENANT, 21.

1. The Lord Chancellor sometimes sits in equity, sometimes in bankruptcy, and sometimes in lunacy, but still he has the authority of Lord Chancellor in whichever he is sitting. *Dicas v. Lord Brougham*, 249

BEGIN, RIGHT TO. 813

2. The Lord Chancellor, sitting in bankruptcy, committed the solicitor to a commission, for not obeying an order:—*Held*, that the Lord Chancellor had jurisdiction so to do, and that no action lay against him for so doing:—*Held*, also, that the Lord Chancellor, in an action brought against him for so doing, need not plead specially. *Ibid.*

3. The Lord Chancellor has authority, in any particular case, to make an order altering the practice of the Court of Chancery. *Ibid.*

4. If in trover by the assignee of a bankrupt the plaintiff's title as assignee be put in issue—the fiat of bankruptcy inrolled, the certificate of the appointment of the plaintiff as assignee inrolled, and the appointment itself (also inrolled) are sufficient proof that the plaintiff is assignee. *Scott v. Thomas*, 611

5. A written statement, made by the bankrupt before his bankruptcy, of his debts and credits, is evidence as shewing that he knew of his own insolvency. *Ibid.*

6. Personal property may be transferred for a sufficient consideration, without writing, if the possession be also transferred; and a debtor may prefer one creditor to another, if the debtor be not a trader; but if he be a trader he cannot prefer one creditor to another, unless he be pressed. *Ibid.*

7. A fraudulent delivery of goods by a trader will be of itself an act of bankruptcy. A delivery of goods to one to whom no debt was due would be such a fraudulent delivery; and the delivery would likewise be fraudulent, though a debt was due, if the transfer of the goods was made voluntarily, and in contemplation of bankruptcy. *Ibid.*

8. Form of pleas. *Ibid.*

BEGIN, RIGHT TO.

1. The fifteen Judges have made a resolution that the plaintiff shall

begin on the trial in all actions for personal injuries, libel, and slander, although the general issue may not be pleaded, and the affirmative be on the defendant. *Carter v. Jones*, 64

2. In an action of trespass for taking goods, the defendant, without pleading the general issue, pleaded that the house of the plaintiff was "within and parcel of the parish of M.," and that he, being a constable, took the goods under a warrant of distress for parochial rates. The replication stated that the house was not "within or parcel of the parish of M." The plaintiff's counsel claimed the right to begin, as they had to prove the demand of perusal and copy of the warrant. This the defendant's counsel offered to admit:—*Held*, that the defendant had the right to begin. *Burrell v. Nicholson*, 202

3. In assumpsit for work and labour, the defendant pleaded that the "promise was made to the plaintiff and J. S., and not with the plaintiff alone." Replication, that the "promise was made to the plaintiff alone, and not to the plaintiff and J. S.:—*Held*, that, on this issue, the plaintiff ought to begin. *Davis v. Evans*, 619

4. In an action by the indorsee of a bill of exchange against the acceptor, the defendant pleaded, first, that the bill was accepted for a debt from which he was discharged under the Insolvent Debtors' Act, of which the plaintiff at the time of the indorsement had notice; and, secondly, that the bill was accepted to induce the drawer not to oppose the discharge of the defendant under that act, of which at the time of the indorsement the plaintiff also had notice. The plaintiff, in his replication, denied the notice stated in each of the pleas:—*Held*, that, on these issues, the defendant must begin, and that the onus of proving that the plaintiff had notice was on the defendant. *Warner v. Haines*, 666

5. If, in an action for false imprisonment, the defendant plead, as a justification, that the plaintiff stole feathers, and that he was therefore imprisoned, and the plaintiff reply de injuriâ, the plaintiff is entitled to begin, although the affirmative is on the defendant, and there be no general issue. *Atkinson v. Warne*, 687

6. If, in assumpsit on bills of exchange with a count upon an account stated, the defendant plead payment to the counts on the bills, and non assumpsit to the account stated:—*Held*, that the defendant is entitled to begin, unless the plaintiff's counsel have some evidence to give upon the account stated. *Smart v. Rayner*, 721

7. A party gave a check for the amount of a deposit on a sale by auction, and the sale was void. In an action on the check, he pleaded that there was no consideration for the check, and the plaintiff replied that there was consideration:—*Held*, that, on this issue, the defendant must begin. *Mills v. Oddy*, 728

8. In covenant to recover damages for the non-performance of an agreement under seal, if the defendant plead only that the deed was obtained by fraud and covin, the affirmative of the issue being upon him, his counsel has a right to begin, although the damages are uncertain, and evidence is necessary to guide the jury in forming their estimate of them. *Reeve v. Underhill*, 773

BILL OF EXCHANGE AND PROMISSORY NOTE.

See AUCTION.—BEGIN, RIGHT TO, 6, 7.—EVIDENCE, 21.—EXECUTORS AND ADMINISTRATORS, 1, 2.—WITNESS, 5.

1. It is the regular and usual course of business in commercial transactions to deliver out a bill of exchange, left for acceptance, to any person who mentions the amount,

and describes any private mark or number upon it; and if the clerk of the party leaving it by his conduct enables a stranger to discover the mark or number, in consequence of which the bill is delivered out to him, the party leaving it cannot maintain trover for the bill against the party who so delivered it out. *Morrison v. Buchanan*, 18

2. By the law of France, an indorsement in blank of a promissory note is not valid. But *semble*, that there is nothing in that law which makes it absolutely necessary for a promissory note to be protested for non-payment, in order to enable the holder to recover against the maker. *Trimbey v. Vignier*, 25

3. *Semble*, also, that, by the same law, a promissory note may be indorsed after it becomes due. *Ibid.*

4. If a promissory note be concocted in France, the maker being domiciled there both at the time of making and when it becomes due, whether, if he afterwards comes to England, an action is maintainable against him in the English Courts upon it, although it lacks the formalities required by the French law—*quære?* *Ibid.*

5. A., the drawer of a bill, gave it to B., unindorsed, to present it for payment. B. did so, and got it noted. Afterwards A. indorsed the bill, and gave it to B. to obtain payment:—*Held*, that this indorsement was sufficient to enable B. to recover in an action against the acceptor, notwithstanding A. said, upon the trial, that B. was indebted to him, and that he did not give him any authority to bring the action. *Adams v. Oakes*, 70

6. If A. draw a bill of exchange, payable to his own order, which he parts with without receiving value for it, and B. obtains it on an usurious discounting of it, and after that the plaintiff gives value for it, but takes it under circumstances amounting to gross negligence in him, he

cannot recover on it against A.; but, if the circumstances under which the plaintiff took it were only such as were calculated to excite his suspicion, but do not amount to gross negligence, this will not prevent the plaintiff from recovering. *Crook v. Jadis*, 191

7. A., being arrested by the indorsee of some foreign bills of exchange drawn upon him, and which he had previously refused to accept, said that he would have accepted them when presented, but that he had not the funds from France; and that, when he had got the funds, he would have paid them, but for some expressions of the indorsee, which he thought reflected on his honour; adding, that he had told the clerk of the indorsee, that, when he got the funds over from France, the bills should be paid:—*Held*, that this amounted to an acceptance by the defendant, and, the funds having been received by him, that he was bound to pay the bills. *Mendisabal v. Machado*, 218

8. Assumpsit against John K. on "a bill accepted by Joseph K. in the name of John K. & Co." There being no plea in abatement:—*Held*, on proof of the facts, that as the acceptance was in the hand writing of Joseph, and that he had before done business in the name he signed, that the verdict must be given against him. But the Judge intimated, that, if it had been proved (as it was stated), that John was the party who was arrested in the action, the plaintiff must have been nonsuited. *Wilde v. John Keep*, 235

9. A note, whereby a party promises "to pay or cause to be paid" 130*l.*, is a promissory note, and may be declared on as such, and does not require an agreement stamp. *Lovell v. Hill*, 238

10. In an action by the indorsee against the acceptor of a bill of exchange, the bill appeared, on inspection, to have been altered in amount, and after the acceptance were the

words "at Cockburn's," which were not in the defendant's handwriting. Neither the plaintiff nor defendant gave evidence as to when or by whom the alterations were made:—*Held*, that it was for the jury to say, under the circumstances, whether the bill had been altered after acceptance, and that, if they thought it had, the plaintiff could not recover. *Taylor v. Mosely*, 273

11. "I promise to pay to M. A. D., or bearer, on demand, 16*l.* at sight, by given up clothes and papers, &c.," was sued on as a promissory note:—*Held*, that, if the jury thought that the clothes, &c. had been previously given up by the payee to the maker, it was a good promissory note, as the words in that case would only import the value received. *Dixon v. Nuttall*, 320

12. In an action on a bill of exchange, a plea that the bill was indorsed by the defendant to the plaintiff without consideration is bad on special demurrer, but good after verdict. The defendant ought to plead his matter of defence affirmatively. *Easton v. Pratchett*, 736

13. If A. has accepted three bills for the accommodation of B., and is obliged to pay them, and also to pay the costs of two actions brought upon two of them:—*Held*, that A. cannot, in an action against B., recover the amount of the costs of the two actions if his declaration contain only the common money counts, but that to recover these costs he should have declared specially. *Seaver v. Seaver*, 673

14. It was agreed between the plaintiff, the defendant, and H., that the defendant should make his note for 20*l.*, and that the plaintiff should draw on his bankers for 20*l.*, and pay in this note, and the plaintiff was to have 7*l.* 12*s.*, and the two others 6*l.* 4*s.* each. The money was thus procured, and the defendant, not wanting his 6*l.* 4*s.*, let H. have it.

It was at first agreed, that, when the note became due, they should contribute their shares to meet it; but H. told the plaintiff afterwards that he would provide 12*l.* 8*s.* towards it:—*Held*, that, if the defendant gave this note for the accommodation of the plaintiff and H., the plaintiff would not be entitled to recover on it; but that, if the plaintiff was to advance 20*l.* and receive 7*l.* 12*s.* as a gift, the plaintiff could recover the whole of the 20*l.* on the note:—*Held*, also, that, if the defendant was to be only security for 12*l.* 8*s.*, he would be liable only to that amount; and that, if each was to pay his own share, the plaintiff could only recover 6*l.* 4*s.* from the defendant, and that H. saying afterwards that he would pay 12*l.* 8*s.* would make no difference, unless the plaintiff then made a new bargain to release the defendant from liability altogether. *Homan v. Thompson*, 717

15. On an issue whether consideration was given by the plaintiff for a note, the letters of the plaintiff, shewing that he was pressed for money, are evidence for the defendant. *Ibid.*

16. In assumpsit by the indorsee against the acceptor of a bill of exchange, if it appear that, following the acceptance, there are words, not in the acceptor's handwriting, making the bill payable at a particular place, it is incumbent on the plaintiff to shew that the words were written by the acceptor's authority; and it seems that the addition of such words is a material alteration of a bill since and notwithstanding the stat. 1 & 2 Geo. 4, c. 78. *Desbrou v. Weatherley*, 758

BOND.

See MASTER AND SERVANT, 2.

1. In debt on a bond (with *non est factum inter alia* pleaded), to secure the payment by instalments of the consideration for the purchase of a business, the plaintiff ought to suggest

breaches, and if he has not done so, and a verdict be found for him on the plea of *non est factum*, he is not entitled to a certificate for speedy execution under the statute. *D'Aranda v. Houston*, 511

2. Also, in such a case, to support a plea that the bond was obtained by fraud, covin, and misrepresentation, it is not enough to shew that the business did not produce to the purchaser the sum represented by the seller; but, if it be shewn that it did not produce the sum to the seller himself, it will be enough, as in such case it may be assumed that the representation was untrue to the knowledge of the party making it. *Ibid.*

BROKER.

1. In an action by a party who has bargained with a broker for the sale of goods belonging to a third person, for assuming the right to sell without having authority, in order to make out a contract for the sale, it is not necessary, in point of law, that there should be bought and sold notes. *Pauli v. Simes*, 506

2. If a party receiving an invoice does not object to it on the ground of its brevity and incompleteness, the party furnishing it will be bound by it. *Ibid.*

3. If brokers alter an invoice of the owner of goods from the name of one purchaser to another, and send it to the latter with a letter saying, that, to simplify the transaction, they had transferred the seller's invoice to him, such invoice will amount to a contract of sale. *Ibid.*

BURNING.

1. A. was charged with setting fire to the ricks of B., C., and D., upon the oath of E., an accessory before the fact, and a warrant to apprehend A. was granted, mentioning all the three charges, and stating them to be

made on the oath of E. The person who apprehended A. told her that "a very serious oath had been made against her by E." on these three charges. After this A. made a statement, which was received in evidence. *Rea v. Charlotte Long*, 179

2. A. set fire to the ricks of B., C., and D., one immediately after the other. There were three indictments, one for each fire. The rick burnt last was the subject of the indictment first tried. An accessory before the fact was called, and was allowed to give evidence of the whole transaction as to the three ricks. *Ibid.*

3. Setting fire to a score of faggots, which were piled one upon another in a loft, which was made by means of a temporary floor put over an archway, roofed in between two houses, and under which carts could go, is not setting fire to a stack of wood within the stat. 7 & 8 Geo. 4, c. 30, s. 17. *Rea v. Aris*, 348

4. A cart hovel, consisting of a stubble roof supported by uprights, in a field at a distance from other buildings, is not an outhouse within the meaning of the stat. 7 & 8 Geo. 4, c. 30, s. 2. *Rea v. Parrott*, 402

CARRIER.

Hat bodies, which are made partly of the soft substance which is taken from the skin of rabbits, and partly from the wool of sheep, do not come under the description of *furs* in the Carriers' Act, 11 Geo. 4 & 1 Will. 4, c. 68. *Mayhew v. Nelson*, 58

CENTRAL CRIMINAL COURT,
OPENING OF THE, 627.

The binding over to prosecute, which is necessary to give the *grand jury* of the Central Criminal Court jurisdiction in certain cases of misdemeanour, under the 13th section of the act 4 & 5 Will. 4, c. 36, must take place before a magistrate, &c. previous

to the session of that Court, and cannot be done by the Court itself. *Rex v. Carlton*, 651

CHANCELLOR'S, LORD, JURISDICTION.

See BANKRUPT, 1, 2, 3.

COMMITMENT BY LORD CHANCELLOR.

See BANKRUPT, 1, 2, 3.

CONFESSION.

1. A constable said to a prisoner charged with felony—"It is of no use for you to deny it, for there is the man and boy who will swear they saw you do it:"—*Held*, that this was such an inducement as would exclude evidence of what the prisoner said. *Rex v. Mills*, 146

2. A prisoner before the magistrate made a statement, which by mistake was written in the information book, and headed—"The information and complaint of A. B.:"—*Held*, that it was not receivable, although the mistake could have been explained by the magistrate's clerk. *Rex v. Bentley*, 148

3. Several persons (one of whom was the prisoner) were summoned before the committing magistrate touching the poisoning of C. No person was then specifically charged with the offence. The prisoner was sworn and made a statement, and at the conclusion of the examination the prisoner was committed for trial:—*Held*, that this statement was not receivable in evidence against the prisoner. *Rex v. Lewis*, 161

4. A. gave a mortal blow to B., his master, who took out a summons against A. for an assault. The charge of assault was heard under this summons before Mr. D. and another magistrate, who summarily convicted A. of the assault. What was said by the parties before the magistrates was not taken down in writing. B. died:—

Held, that, on the trial of A. for the murder of B., Mr. D. might give evidence of what B. said in the presence of A. at the hearing before the magistrates, and of what A. said in answer to it. *Rex v. Edmunds*, 164

5. If a prisoner in making a statement mention the name of another prisoner, the witness who gives evidence of the statement must state exactly what the prisoner said, without omitting the name of the other prisoner. *Rex v. Walkley*, 175

6. If the witness said to the prisoner, "It would have been better if you had told at first," this is an inducement to confess, and will render a statement made thereupon inadmissible. *Ibid*.

7. When, before the committing magistrate, one of the prisoners was examined as a witness against the other, and, after being examined, was charged as a prisoner:—*Held*, that what this prisoner said before the magistrate as a witness could not be given in evidence against her on her trial for the offence. *Rex v. Davis*, 177

8. A prisoner charged with felony made a statement before the committing magistrate, which was taken down, and signed by the prisoner, but there was nothing on the face of the paper to shew, that, at the time the prisoner made the statement, he was under examination on a charge of felony:—*Held*, that this examination could not be used as an examination taken under the stat. 7 Geo. 4, c. 64, but that the clerk to the magistrates might state what the prisoner said, using the paper to refresh his memory. *Rex v. Tar-rant*, 182

9. A prisoner charged with felony made a statement before the committing magistrates, which was taken down in writing, but not signed by the prisoner:—*Seemle*, that the magistrates' clerk should give evidence of what the prisoner said, using that which was taken down to refresh his memory. *Rex v. Pressly*, 183

CONFESSION.

10. If a prisoner be told, "You had better split, and not suffer for all of them;" this is such an inducement to confess as will exclude what the prisoner afterwards said. *Rex v. Thomas*,

353

11. A. was in custody on a charge of murder. B., a fellow prisoner, said to him, "I wish you would tell me how you murdered the boy—pray split." A. replied, "Will you be upon your oath not to mention what I tell you?" B. went upon his oath that he would not tell. A. then made a statement:—*Held*, that this was not such an inducement to confess as would render the statement inadmissible. *Rex v. Shaw*,

372

12. A. and his wife were separately in custody on a charge of receiving stolen property. A person, who was in the room with A., said—"I hope you will tell, because Mrs. G. can ill afford to lose the money;" and the constable then said—"If you will tell where the property is, you shall see your wife:"—*Held*, that a statement made by A. afterwards was admissible in evidence. *Rex v. Lloyd*,

393

13. Where a prisoner, who made a confession to a constable, in consequence of a promise held out, was taken before a magistrate, who, knowing what had taken place, cautioned the prisoner against making any confession before him; but the prisoner, notwithstanding, did make a confession to the magistrate:—*Held*, that this second confession was receivable in evidence on the trial of the prisoner, though it did not appear that the magistrate told the prisoner that his first confession would have no effect, and he therefore might have acted under an impression, that, having once acknowledged his guilt, it was too late to retract. *Rex v. Howes*,

404

14. What a prisoner is overheard to say to his wife, or even what he is overheard to say to himself, is re-

CORONER'S INQUISITION. 819

ceivable in evidence against him on a charge of felony. *Rex v. Simons*, 540

15. A prisoner charged with felony being in custody handcuffed in the house of the prosecutor, after a conversation with the prosecutor and another person, in which he was told that they would do all they could for him, said—"If the handcuffs are taken off I will tell you where I put the property:"—*Held*, that this statement was receivable in evidence, and could not be objected to, either as a confession made under a promise, or a statement obtained by duress. *Rex v. Green*,

655

CONSPIRACY.

If brokers agree together before a sale by auction that only one of them shall bid for each article sold, and that all articles thus bought by any of them shall be sold again among themselves at a fair price, and the difference between the auction price and the fair price divided among them, this is a conspiracy for which they are indictable. *Levi v. Levi*,

239

CONSTABLE.

See FALSE IMPRISONMENT, 6, 8.

A police officer hearing a noise in a public-house at one o'clock in the night entered the house, the door being open:—*Held*, that this was not a trespass. *Rex v. Smith*,

136

CONTRA FORMAM STATUTI.

See INDICTMENT 3.

CONVICTION.

See WOOLLEN MANUFACTURES.

CORONER'S INQUISITION.

It is no objection to a coroner's inquisition, that one of the jurors did not sign his Christian name at length, if the names be set out at length in the body of the inquisition. *Rex v. Bennett*,

179

CORPORATION.

See EVIDENCE, 18, 19, 20.—TOLL.—
USE AND OCCUPATION.

COVENANT.

See BEGIN, RIGHT TO, 8.—DEBT, 3.—
LANDLORD AND TENANT, 1, 2, 6, 7,
8.—SHIPPING, 1, 2, 3.

If there be a covenant by the letter of cabins on board ship to *permit* and *suffer* the hirer to stow away the baggage of the passengers in a particular part of the hold of the ship:—*Held*, that this fairly imported, that there should be some demand or request made by the hirer for the clearing of the space agreed on. *Corbyn v. Leader*, 32

CREDIT, TO WHOM GIVEN.

See EVIDENCE, 5.

1. When a tradesman makes out an account for goods in the name of a particular person, it must be taken that they were furnished on the credit of such person, unless it be shewn by *unequivocal evidence* that the credit was in fact given to another. *Storr v. Scott*, 241

2. To charge a father with the amount of clothes supplied to his son, it is essential that the clothes should have been supplied either with the assent of the father, or by his authority; and the father is the person to judge what is proper for his son. *Rolfe v. Abbott*, 286

CROSS-EXAMINATION.

See WITNESS, 15.

DAMAGES.

See DEBT, 4.—FALSE IMPRISON-
MENT, 9, 10.

Plea, that the plaintiff has sustained no greater damages than a sum paid into Court. 712

DAMAGE, SPECIAL.

See EVIDENCE, 37.—FALSE IMPRISON-
MENT, 8.

DEBT.

1. In an action of debt for work and labour on an implied contract, the defendant, on the plea that he never was indebted, may go into evidence to prove that the work was done under such circumstances as shew that there was no implied contract to pay any thing; but upon this plea the defendant cannot go into evidence of misconduct, except such as goes to shew that there was no implied contract to pay. *Cooper v. Whitehouse*, 545

2. If one sue several defendants in debt, and the evidence do not fix all the defendants, the plaintiff must be nonsuited, and the Judge will not allow the declaration to be amended by striking out the names of those defendants who are not affected by the evidence. *Ibid.*

3. If in debt for goods sold the defence be that the goods were sold on a credit not expired at the time of the bringing of the action, this must be specially pleaded. *Edmunds v. Harris*, 547

4. A. covenanted to pay B. 270*l.* on the 15th of December, with interest up to that time. He did not do so, and B. brought an action of debt, laying his damages at 10*l.*:—*Held*, that B. could not recover any more than the principal, the interest up to the 15th of December, and 10*l.* more, although the interest up to the time of the action amounted to a larger sum; and the Judge at the trial would not order the declaration to be amended, by inserting a larger sum than 10*l.* as damages. *Watkins v. Morgan*, 661

DEMOLISHING HOUSES.

See RIOTERS, INJURIES BY.

DEPOSITION.

1. Where a prosecutrix in a case of felony be bedridden, and there be no probability that she would be ever able to leave her house, the Judge

DISTRESS.

will admit her deposition before the magistrate, the same as if she were dead. *Rex v. Hogg*, 176

2. A., who was a witness for the prosecution against B., on a charge of arson, had first been examined by the magistrate before any specific charge was made against any person, and his deposition taken in writing. A. was next accused of the offence, and his statement as a prisoner was also taken down by the magistrate. After this B. was charged with the offence, and A. examined as a witness, when A.'s statement made at that time was taken down, B. being then committed:—*Held*, that all these statements of A. so taken down ought to be returned to the Judge, and not merely the statement made when B. was committed. *Rex v. Simons*, 540

DEVISE.

A. made a will containing these words:—"I leave and bequeath unto the said William George Lister all the property, freehold, leasehold, and of whatever description I am possessed of or have claim to:"—*Held*, that that was a bequest of all A.'s estate, whatever it was, and that A. being possessed of the fee, it was a bequest of such fee, and not of an estate for life merely. *Doe d. Pile v. Wilson*, 301

DISSENTING MINISTER.

If a dissenting minister be appointed minister of the chapel by a part of the trustees of it, he cannot maintain an action against all the trustees for his salary; and the fact of all of them having signed a notice to him, demanding the possession of the chapel, will not make any difference. *Cooper v. Whitehouse*, 545

DISTRESS.

See LANDLORD AND TENANT, 4, 5, 9, 12, 13, 14, 15, 16, 17, 19, 22, 23, 24, 25, 26, 27.

EJECTMENT.

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ECCLESIASTICAL PROPERTY.

See SCHOOL.

EJECTMENT.

See EVIDENCE, 3.

1. A. devised the residue of a term determinable on lives to B. After the decease of the testator, the administrator with the will annexed paid the rent reserved on the term for six years, and charged it to B.:—*Held*, that this was sufficient evidence of his assent to the bequest to enable B. to maintain ejectment. *Doe d. Maberley v. Maberley*, 126

2. In ejectment, evidence that the lessor of the plaintiff received rent for the premises from A., who formerly occupied them, and also from the parish officers, is admissible, although the defendant does not claim under either A. or the parish officers. *Doe d. Lichfield v. Stacey*, 139

3. If, on the trial of an ejectment, it appear that the parish is mis-stated in the declaration, the Judge will allow it to be amended under the stat. 3 & 4 Will. 4, c. 42, although the ejectment be for a forfeiture. *Doe d. Marriott v. Edwards*, 208

4. In ejectment, the defendant's counsel has no right to the general reply, unless he admits the whole *prima facie* case of the lessor of the plaintiff. Therefore, where the counsel for the defendant only admitted the pedigree of the lessor of the plaintiff, and his counsel proved the seisin of the ancestor, by receipt of rent, which case was answered by setting up a will, the validity of which was disputed by evidence on the part of the lessor of the plaintiff, it was held that the defendant's counsel was not entitled to the general reply. *Doe d. Pile v. Wilson*, 301

5. Where a vicar brings ejectment claiming in right of his vicarage, a letter written by a former vicar is ad-

missible in evidence for the defendant, and a witness for the lessor of the plaintiff may be asked as to what is inscribed on a tablet fixed up in the church. *Doe d. Coyle v. Cole*, 359

6. A., thirty years ago, died seised of a cottage, having a son B. and a daughter C. At his death, C., his daughter, then unmarried, took possession of it, and afterwards married D., and after his death W. After her death, W. remained in possession sixteen years:—*Held*, that the son of B., who was the heir of C. as well as being the heir of A. and B., might recover in ejectment, although W., including the term he had occupied the cottage with his wife, had had more than twenty years' possession of it. *Doe d. Tranter v. Wing*, 538

ELECTING.

See TRESPASS, 2.

ELECTION.

If a person who is not himself a candidate, and who is not known to the party who supplies refreshments to be an agent of a candidate, open a public-house at an election, and order supplies for the voters, he is personally liable to pay, and the Treating Act, 7 & 8 Will. 3, c. 4, will afford him no defence if the goods were supplied entirely on his credit. *Thomas v. Harries*, 615

EMBEZZLEMENT.

If a servant be indicted under the stat. 7 & 8 Geo. 4, c. 29, for embezzlement, and the indictment contain only one count, charging the receipt of a gross sum on a particular day, if it turn out that the money was received in different sums, on different days, the prosecutor must make his election, and confine himself to one sum and one day; and if the money was paid to the prisoner as the servant of the prosecutor, it will be

EVIDENCE.

sufficient, although the payment was made by one of a class of customers of whom the prosecutor did not authorize the prisoner to receive money. *Rex v. Williams*, 626

ENCROACHMENT.

See LANDLORD AND TENANT, 20.

EVIDENCE.

See ACCOMPLICE.—ADULTERY, 2.—BANKRUPT, 4, 5.—BILL OF EXCHANGE, 15.—BURNING, 1, 2.—CONFESSION. — DEPOSITION. — EJECTMENT, 2, 4, 5.—EXECUTORS AND ADMINISTRATORS, 5, 6.—FALSE PRETENCES, 1.—FORGERY, 4.—INFANT, 5.—LANDLORD AND TENANT, 10, 13, 15.—MANSLAUGHTER, 3, 5.—MASTER AND SERVANT, 2.—MURDER, 1, 3.—NUISANCE, 4, 5.—PERJURY, 2, 3, 4.—POACHING.—POOR.—RAPE.—RECEIVER, 3.—SCHOOL, 4.—SHERIFF, 2, 3.—STABBING.—TOLL.—TRESPASS, 2, 3.—WITNESS.—WOOLLEN MANUFACTURE.—WRECK, 2.

1. Where, on the second trial of a cause, a witness stated, that he had on the argument for the new trial, handed a document to one of the learned Judges, and had not since seen it or been able to find it, secondary evidence was received of its contents, without any search for it having been made at the chambers of the learned Judge, the presumption being that his lordship returned it to the party who produced it. *Deacon v. Fuller*, 74

2. In a case of felony, where the defence was an alibi, the witnesses for the prisoner stated that they respectively saw him at various places on his route from Gloucestershire to Warwickshire for two days before, and up to the time of the felony being committed:—*Held*, that the counsel for the prosecution might call a witness in reply, to prove that the pri-

soner had said he was at home on those days. *Rea v. Findon*, 132

3. Entries signed by a deceased agent, but not in his handwriting, but by which such agent charges himself, are receivable in evidence. *Doe d. Lichfield v. Stacey*, 139

4. In an action on a promissory note, the defendant wished to give in evidence a composition deed executed by his mother and the plaintiff, and also by various of the defendant's creditors, but not by the defendant himself. It was in the hands of a trustee, who was willing to produce it, but the plaintiff's counsel objected:—*Held*, that the trustee ought not to produce it, but that the defendant might give in evidence an extract which had been furnished by the trustee, and which he, the trustee, proved to be a correct extract. *Cocks v. Nash*, 154

5. If, in an action for goods sold, the question be whether the credit was given to the defendant's wife or to her father, evidence that other persons had given credit to the father is not receivable. *Smith v. Wilkins*, 180

6. There are no degrees in secondary evidence; therefore, where a defendant has given notice to the plaintiff to produce a letter, of which he kept a copy, he may, if the letter is not produced, give parol evidence of its contents, and is not bound to put in the copy; but, if there had been a duplicate original, it might be otherwise. *Brown v. Woodman*, 206

7. In assumpsit against several defendants, a statement made by one is receivable in evidence, as the plaintiff may proceed by steps to fix each of the defendants separately. *Whitford v. Tutin*, 228

8. Proof of the possession by a member of a committee of books, which he has in his custody, not as such member, but as tenant of the premises previously occupied by such committee, is not sufficient, in an action against other members of the

committee, to let in parol evidence of the contents on notice and non-production. *Ibid.*

9. If a witness, called for the plaintiff, be asked, on the part of the defendant, whether the plaintiff had any conversation with him on a particular subject, and the witness state any thing that the plaintiff said on that subject, the plaintiff's counsel may examine as to every part of the same conversation; but, if the witness state that the plaintiff had no such conversation with him, this does not let in the plaintiff's counsel to examine as to any thing else that the plaintiff said. *Dicas v. Lord Brougham*, 249

10. A witness for the defendant was examined on a commission granted under the stat. 1 Will. 4, sess. 2, c. 22, s. 4; on his cross-examination a paper signed by him was produced to him, and a portion of his cross-examination and re-examination related to it and was founded on it. The paper was annexed to the deposition:—*Held*, that this paper was not to be read as a part of the cross-examination of the witness, but that, if the plaintiff's counsel wished it to be read before the cross-examination was read, it must be read as his evidence, so as to entitle the defendant's counsel to observe on it in a special reply. *Stephens v. Foster*, 289

11. An allegation that "on &c., at &c., a certain indictment was preferred at the Quarter Sessions of the Peace then and there holden in and for the said county of W., against the defendant and one T. E., which said indictment was then and there found a true bill," is not supported by the production of the original indictment with the words "true bill" indorsed on it, it being necessary that a regular record should be drawn up, and proved, either by its production or by an examined copy. *Porter v. Cooper*, 354

12. A prisoner was in custody on

a charge of forgery, but was not allowed even to see his wife: he wrote to a friend, "to ask Mr. G., or some other solicitor, whether the punishment was the same, whether the names forged were those of real or of fictitious persons." Mr. G. was not his attorney:—*Held*, that this was not a privileged communication. *Rex v. Brewer*, 363

13. On an indictment for perjury, committed on the hearing of a parish appeal at the Quarter Sessions, the production of the Sessions' book is not sufficient proof that the appeal came on to be heard; and a regular record must be made upon parchment, the same as on a return to a certiorari, and that record or an examined copy must be produced. *Rex v. Ward*, 366

14. What a mortgagor, in treaty to raise money, says to the attorney of the mortgagee, is not a privileged communication. *Marston v. Downes*, 381

15. In an action against a mortgagor, the attorney of the mortgagee, who has the mortgage deed, cannot be compelled to produce it, if he objects to do so; nor can he be compelled to give evidence of its contents; but he may be asked for what purpose the money was raised; and secondary evidence may be given of the contents of the mortgage deed. *Ibid.*

16. The Judges have held, that, if a prisoner is indicted for a felony after a previous conviction, the proof of the previous conviction is to be given before the prisoner is called on for his defence. *Rex v. Jones*, 391

17. If a party robbed go within a few hours after the robbery to a constable, and mention the name of the person who robbed him, the party robbed may be asked at the trial whether he named any person to the constable; but ought not to be asked what name he mentioned: and the

constable may be asked, whether, in consequence of the party robbed mentioning a name to him, he went in search of any person, and, if so, who that person was. *Rex v. Wink*, 397

18. A counterpart of a feoffment by the corporation to an individual of land, &c., in the town of Northampton, produced from among the corporation muniments, was held inadmissible, it appearing that no rent was received in respect of the property. *Lancum v. Lovell*, 441

19. It was proved that it had been the practice, as long as the witness who was conversant with the subject could remember, for the town-treasurer to furnish the town-clerk with information, from which he made out his (the treasurer's) accounts, and also for the treasurer to attend before the auditors, unless prevented by illness or accident, and produce vouchers verifying the town-clerk's statement. Entries in books of that description, commencing with the year 1766, were tendered in evidence. Some of them were signed by the auditors as allowed, and to some of them appeared only an unsigned entry of their having been examined:—*Held*, that those which were signed by the auditors were admissible without proof of any attendance by the particular treasurer before the auditors, or of any entry in his writing, charging himself; partly on the ground that there was reasonable evidence of his having made the town-clerk his agent for the making out of the accounts. *Ibid.*

20. The defendant read in evidence a part of a record roll of presentments before Justices in eyre, and it appearing that there was one roll for each hundred, and that reference was made in one part to another part of the same roll, it was held that the plaintiff was entitled to have read such parts as he thought proper. *Ibid.*

21. In assumpsit by indorsee against acceptor of an English bill of exchange,

to shew that the plaintiff had received the bill when it was over due, a protest, which had been made of it by the plaintiff's immediate indorser, being in the hands of the plaintiff, was called for by the defendant at the trial on notice to produce. On its production it appeared to be attested by a subscribing witness:—*Held*, that the mere circumstance that the protest came out of the hands of the plaintiff, as he did not claim title under it, was not sufficient to dispense with the necessity of calling the subscribing witness; but it being proved that on two occasions the paper had been produced by the plaintiff's attorney to the defendant's attorney, as the protest applying to the bill in question, it was admitted in evidence without proof of the attestation. *Marin v. Palmer*, 466

22. A local act, containing the usual clause that it shall be deemed and taken to be a public act, &c., may be read in evidence without any proof of its having been printed by the King's printer, or compared with the original on the rolls of Parliament. *Woodward v. Cotton*, 491

23. If the vicar of a parish be applied to for an extract of a parish register of a particular date, and he state that there is no register book of that year, this is not sufficient proof of loss of the book to let in secondary evidence of the contents of the register, without calling the vicar; but if the vicar had produced to the applicant a book as the original register, the Judge at the trial would have held it to have been so, unless the contrary was shewn. *Walker v. Beauchamp*, 552

24. *Semble*, that the returns made annually of transcripts of parish registers to the registry of the diocese, under the 70th canon, are not receivable in evidence instead of the original register, or an examined copy of it, without proof of the loss of the original register; but *semble*, that, if

the original be proved to have been lost, examined copies of these returns would be admissible. But if the returns were made under the statute 52 Geo. 3, c. 146, ss. 6 & 7, *semble*, that examined copies of them would be evidence, without proof of the loss of the original register. *Ibid.*

25. If an original parish register be produced on a trial, that certain entries in it should be read, the jury may look at the book to see whether the entries which have been read are in their proper places or not, but for no other purpose. *Ibid.*

26. A., in the year 1798, died possessed of property, which, many years afterwards, B. commenced a suit to recover. In the year 1799, a relation of B. made a declaration, the effect of which was to shew that B. was the heir and next of kin of A.:—*Held*, that this declaration was not receivable in evidence, as the *lis mota*, or commencement of controversy, must be taken to be the arising of that state of facts on which the claim is founded, without any thing more. *Ibid.*

27. The manors of R. and of S., the parishes of C. and of Y., and the counties of Brecon and Glamorgan, were coterminous:—*Held*, that, in an action for disturbance of common, in which the boundaries of the two manors came in question, a county history of the county of Brecon, which stated the boundaries of the counties at this spot, was not receivable in evidence. *Evans v. Getting*, 586

28. Upon the trial of an ejectment brought by churchwardens and overseers to recover a house, alleged, on the part of the lessors of the plaintiff, to be a parish house, a rated inhabitant of the parish is a competent witness for the plaintiff, under the stat. 54 Geo. 3, c. 170, s. 9. *Doe d. Higgs v. Cockell*, 525

29. If the opposite party be called on to produce a paper, (under a notice to produce), he must either produce it

when called for, or not at all, and he cannot, after having refused to produce it, put it into a witness's hand, at a later period of the cause, to ask him at what time an interlineation was made in it. *Ibid.*

30. A. having assigned his stock in trade and business to two trustees, one of them directed the plaintiff to go to Brussels to procure the liberation of A., who was detained there as a prisoner for debt, and it was arranged that Mr. L. should remit the plaintiff money while there. The plaintiff went there, and Mr. L. sent a letter to him there announcing that he had done so:—*Held*, that, in an action by the plaintiff against the trustees for a compensation for going that journey, the statements in Mr. L.'s letter were not evidence; and also that the declarations of a person whom the trustees had placed in the house of business to manage the shop were also not evidence that the plaintiff was entitled to be paid for taking an account of the stock. *Lawrence v. Thatcher*, 669

31. In trespass for taking a piano forte, which the plaintiff had bought of L., the defendant pleaded that it belonged to him, and had been feloniously stolen from him by L., and that he retook it:—*Held*, that whatever would be evidence against L., if he were on his trial for the felony, is evidence in this action to prove the felony to have been committed by L. *Wilton v. Edwards*, 677

32. It being opened that L. had committed this felony by hiring the piano forte, and selling it immediately:—*Held*, that the defendant could not give evidence respecting optical instruments, which were alleged to have been obtained by L. from another tradesman. *Ibid.*

33. If a carman take goods to the house of L., not knowing him, and ask for "Mr. L." of a person whom he

finds in the house, and that person says—"I am Mr. L.," that is *prima facie* evidence that this person was L. *Ibid.*

34. If A. and B. rent a ready furnished bed-room jointly, and both are taken into custody in the bed-room charged with jointly stealing feathers from the bed, and on a search pawn-brokers' duplicates are found on one of them:—*Held*, that these duplicates are receivable in evidence against the other on a plea of justification to an action for false imprisonment brought by that other. *Atkinson v. Warne*, 687

35. An offer made by the attorney of the defendant's father is no evidence against the defendant; and the fact that the defendant afterwards employed the same attorney makes no difference. *Burghart v. Angerstein*, 690

36. Where special damage is alleged that C. declined to deal with the plaintiff, because his bill was dishonoured, the letter C. received announcing to him the dishonour of the bill may be read in evidence to shew that he received such a letter, but is no proof of the statements contained in it. *Whitaker v. Bank of England*, 700

37. *Held*, also, that C. might be asked questions to shew that other causes in addition to the letter induced him to cease from dealing with the plaintiff; and that other witnesses might be asked, whether other bills of the plaintiff had not been dishonoured, but that they could not be asked as to any particular bill without its being produced. *Ibid.*

38. A. had purchased at an auction an under-lessee's interest in a house, and refused to pay a check which he had given for the deposit, because the ground rent payable to the superior landlord was greater than it was stated to be at the time of the sale:—*Held*, that the superior landlord's solicitor was not compellable to produce the counterpart of the original lease; and that a person who had advanced money

on that lease, and held it as equitable mortgagee, could also not be compelled to produce the lease itself; but that if both those, on being called as witnesses, refused to produce the lease and counterpart, secondary evidence might be given of the contents of the lease, by calling any person who had seen it, and who neither claimed under it as one of his own title deeds, nor was privileged as an attorney or solicitor. *Mills v. Oddy*, 728

EXECUTION.

See ASSIGNMENT.

If a sheriff take goods in execution after an act of bankruptcy and sell them, the jury in an action of trover by the assignees may allow to the sheriff the expenses of the sale, if they think the assignees must have sold the goods, if they had not been sold by the sheriff, but this is matter for the jury. *Clark v. Nicholson*, 712

EXECUTION OF CRIMINALS.

See SHERIFF.

EXECUTORS AND ADMINISTRATORS.

See EJECTMENT, 1.

1. A. made a promissory note, payable to B. or order. B. indorsed it, and gave it to C. to get it discounted. C. went away, and shortly afterwards came back to B. with the money. The executors of C.'s father, of whom C. was one, brought an action on the note as executors:—*Held*, that, as the executors produced the note on the trial as executors, they might recover on it, although there was no evidence that C.'s father ever had the note in his lifetime. *Godson v. Richards*, 188

2. A., having appointed B. his executor, gave him a promissory note, payable on demand for 100*l.*, in consideration of the trouble he would have

in the office of executor after his death. B. died in A.'s lifetime, not having put the note in suit:—*Held*, in an action upon it by B.'s executors, that the consideration had totally failed, and the action, therefore, was not maintainable. *Solly v. Hind*, 316

3. In an action against a feme covert executrix and her husband *plenè administravit* was pleaded. It appeared that the husband, who was not executor, paid debts to more than the amount of the assets; but it appearing, that, before he so paid them, he had raised a sum of 1400*l.* by mortgage of lands, under a power given to him by a deed executed by the testator in his lifetime, for the purpose of paying the testator's debts, it was left to the jury to say whether he paid the debts out of the assets in the hands of his wife, or out of the sum so raised. *Marston v. Downes*, 381

4. Equitable assets, when they come into the hands of the executor in money, are legal assets. *Ibid.*

5. In an action against A. and B. as executors, A. suffered judgment by default. The probate of the will was produced, and notice had been given to both the defendants to produce a receipt which had been given to A. as one of the executors:—*Held*, that, if it was not produced, secondary evidence might be given of its contents, and that A.'s having suffered judgment by default made no difference. *Beckwith v. Benner*, 681

6. *Held*, also, that the clerk of Mr. S., an attorney, might be asked whether A. and B. did not, as executors, employ Mr. S. as their attorney. *Ibid.*

EXECUTOR DE SON TORT.

A. had pledged goods to B. for a debt, B. died, and the parish officers took the goods, and gave them to J., the carpenter who made the coffin of B., on condition of his paying B.'s rent and the funeral expenses:—*Held*, that, by taking these goods, the pa-

rish officers became executors *de son tort*; and that, if they sold the goods to J., they would be liable to A. in trover, because such a sale was so inconsistent with the bailment, as to re-vest the right of possession in A. But, if the parish officers, merely relinquished their possession, and let J. take possession, this would not make the parish officers liable in trover; as, in this case, a mere seizure of the goods by a stranger, who afterwards relinquished them, would not be a conversion. *Samuel v. Morris*, 620

EYRE, JUSTICES IN.

See EVIDENCE, 20.

FALSE IMPRISONMENT.

See ASSAULT.—BEGIN, RIGHT TO, 5.
—SHIPPING, 4, 5.—TRESPASS, 4.

1. A. (a boy) was placed at the defendant's boarding school by his mother, whom the defendant afterwards refused to permit to take him away. A. was not detained against his own will, nor did he know that his mother had applied to have him restored to her:—*Held*, that an action for false imprisonment did not lie against the defendant at the suit of A., but that his mother might have maintained an action in a different form. *Herring v. Boyle*, 496

2. In trespass for false imprisonment proof must be given of circumstances from which the Judge and jury may decide whether there was or was not a restraint or detention of the person; and it is not enough for witnesses to swear that they considered the plaintiff was in custody, and thought that he was under restraint; nor is it enough to shew that the defendant, at a police-office, stood before the plaintiff and said, "You cannot go away till the magistrate comes," if it appears that he relinquished that attitude, and went to another part of

the office before the plaintiff had made any attempt to depart. *Cant v. Parsons*, 504

3. Where an attorney's clerk accompanied a creditor to his debtor, and pretended that he was a sheriff's officer, and in consequence the debtor went away with them, not willingly, but supposing they had power to compel him, it was held that this was a sufficient arrest to support an action for false imprisonment, although no writ was produced, and it did not distinctly appear that either the creditor or the clerk had touched the debtor at all. *Wood v. Lane*, 774

4. In an action of trespass for false imprisonment for causing a person to be taken to a police station-house, if it appear that the plaintiff's going proceeded *originally* from the plaintiff's own will, the defendant will be entitled to a verdict, either on "not guilty" or on "leave and licence" pleaded; but the plaintiff will not be deprived of his right to recover damages if it appear, that, being *acted upon* by the defendant's having made a charge of felony against him in the presence of a policeman, he went voluntarily with the policeman to the station-house for the purpose of meeting it. *Peters v. Stanway*, 737

5. In an action for false imprisonment, the defendant pleaded that the plaintiff had stolen feathers from a bed in a ready furnished bed-room let to him by the defendant, and that he therefore gave the plaintiff into the custody of a policeman, who, because the plaintiff resisted, beat the plaintiff and took him to a station-house. There was no evidence either of any resistance by the plaintiff or of any blow given to him by the policeman:—*Held*, that, on proof of the other allegations, the plea was substantially made out. *Atkinson v. Warne*, 687

6. To justify a constable in apprehending a party without warrant for an affray, it is essential that the party

should have been engaged in the affray, that the constable should have had view of the affray while the party was so engaged in it, and that the affray was still continuing at the time of the apprehension. *Cook v. Nethercote*, 741

7. If a person conducts himself in a disorderly manner in a public-house, and the landlord requests him to depart, and he refuses to do so, the landlord is justified in laying hands on him to put him out; and if, while the landlord has hold of him to put him out, the person lays hands on the landlord, this is an assault, and if it is seen by a peace officer he is justified in taking the person into custody. *Honell v. Jackson*, 723

8. So if a person, without committing any assault, make such noise and disturbance in a public-house as would create alarm, and disquiet the neighbourhood, and the persons passing along the adjacent street, this would be such a breach of the peace as would not only justify the landlord in turning the person out of the house, but would justify the landlord in immediately giving the person into the custody of a peace officer, provided that this occurred in the presence of the officer. *Ibid.*

9. A. caused B. to be taken into custody and taken before a magistrate, who remanded B. for two days, and then discharged him; *semble*, that B. (on a declaration for false imprisonment in the usual form) cannot recover for the two days' imprisonment after the remand. *Holtum v. Lotan*, 726

10. Whether he could do so if it were stated as special damage—*quære?* *Ibid.*

FALSE PRETENCES.

1. Where a false pretence was contained in a false letter, which was lost before the trial, the prisoner was con-

victed on parol evidence of its contents. *Rez v. Chadwick*, 181

2. An indictment on a charge of *false pretences* is bad, if it states that the prisoner "unlawfully, knowingly, and designedly, did *feloniously* pretend," &c. *Rez v. Walker*, 657

FIXED FURNITURE.

1. A testator, by his will, devised his house, with the grates, stoves, coppers, &c., and the "fixtures and *fixed furniture*," to his executors, upon trust to permit E. S. V. to have the use thereof for her life, and he also bequeathed his furniture, plate, &c. to E. S. V. absolutely:—*Held*, that chimney-glasses fixed to the wall, and a bookcase screwed or fastened to the wall, are fixed furniture, but that a bookcase merely placed in a recess, and not screwed or fastened to the wall is not so. *Birch v. Dawson*, 658

2. Whether a carpet tacked to the floor is fixed furniture—*quære?* *Ibid.*

FORFEITURE.

See LANDLORD AND TENANT, 21.

FORGERY OF STAMP.

See STAMP, 1.

FORGERY.

1. An indictment had been found against A. for an assault, on which the clerk of the peace had granted a certificate, upon which a magistrate committed A. to the county gaol till he should find sureties, or otherwise be discharged by due course of law. A. wrote a forged letter in the name of another magistrate to the governor of the county gaol, stating that A. had found sureties, and authorizing the discharge of A.:—*Held*, that the writing and uttering of this forged letter was an indictable offence. *Rez v. Harris*, 129

2. A count charging a prisoner

with uttering a *forged bill* with intent to defraud A. B., and setting out the bill and the acceptance upon it, is not supported by proving that the prisoner uttered the bill, and that the acceptance on it was a forgery. *Rex v. Horwell*, 148

3. A count stated that the prisoner had a bill in his possession, (which was set out), with a forged acceptance on it (which was also set out), and that he, knowing the acceptance to be forged, uttered the *bill* with intent to defraud A. B.:—*Held*, not good, *Ibid*.

4. On an indictment for uttering a forged check in the name of J. W., on Messrs. C., G., & Co., who were army agents and bankers, it was proved by a clerk in the former department, that he did not know of any customer named J. W., and that he had been told by the other clerks that there was not any such customer in the banking department:—*Held*, that this was sufficient proof, on the part of the prosecution, to call upon the prisoner to shew that there was in fact such a person as J. W. having an account with Messrs. C., G., & Co.; and, in the absence of such proof, was sufficient by itself for the consideration of the jury. *Rex v. Brannan*, 326

5. In an indictment for forgery, a count, which, since the stat. 1 Will. 4, c. 66, charges that the prisoner, "did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, and did willingly act and assist in the false making, forging, and counterfeiting" a bill of exchange, is good; as are counts charging that he did "utter and publish as true," and did "offer, dispose of, and put away" the bill. *Rex v. Brewer*, 363

6. It is not any offence under the stat. 1 Will. 4, c. 66, to forge an *indorsement upon a warrant or order* for the payment of money. Nor, if

a party write on the back of a bill of exchange, "Received for R. A.," and sign his own name to it, is he guilty of forging a *receipt* within the provisions of that statute. *Rex v. Arscott*, 408

7. If a person presents a bill of exchange for payment with a forged indorsement upon it of a receipt by the payee, and the clerk to whom he presents it objects to a variance between the spelling of the payee's name in the bill and the indorsement, upon which the person alters the indorsement into a receipt by himself for the drawer. *Seemle*, that the act of presenting the bill to the clerk, previous to his objection, is sufficient to constitute the offence of uttering the forged indorsement. *Ibid*.

8. *Held*, that a receipt, signed by the captain of a detachment, on the authority of which money is received from an army agent, on account of the monthly subsistence for such detachment, may be properly described as "a receipt for money," under the stat. 2 & 3 Will. 4, c. 123, s. 10, relating to forgery, although it appeared that such instruments were frequently cashed (upon indorsement) by tradesmen in the neighbourhood of the place where the regiment was stationed, and the amount afterwards received by them of the army agent. *Rex v. Rice*, 634

FRANCE, LAW OF.

See BILL OF EXCHEQUER, 2, 3, 4.

GAS WORKS.

See NUISANCE, 1, 2, 3.

GOODS SOLD.

If there has been a contract for a sale of goods at a specific price, and a subsequent delivery of the goods, the defendant cannot set up, as a defence, that the goods were of so bad a qua-

lity as to be useless, unless he has specially pleaded it. *Roffey v. Smith*, 662

GUARANTIE.

A. had given a cognovit for 37*l.*, payable by monthly instalments; but, if default was made in payment of any instalment, judgment was to be entered up for the whole 37*l.*, or so much as remained due; and B. agreed that A. should attend at the office of C. on the seventh day after "any notice," so that if any of the instalments were not paid, A. might be taken on a ca. sa. The first instalment was not paid, and judgment was entered up for the whole sum, and a ca. sa. sued out. Notice was given to B. for A. to attend at C.'s office on the seventh day. A. did so, but C. gave him a week's time:—*Held*, that this was a complete performance of B.'s agreement, and that, if, after this, another notice was given for A. to attend on another day, and A. did not attend, no action would lie against B. *Turner v. Pyne*, 310

HIGHWAY.

See Way.

1. In an indictment for the non-repair of a highway, it must be affirmatively stated that the road is within the district which is bound to repair it. Stating a road to be out of repair "from and through" a place, excludes the *terminus*. *Rex v. Inhab. of Upton-on-Severn*, 133

2. If a parish be indicted for the non-repair of a pack and prime way, and it be proved that the way is a carriage way, this is a mis-description of the way, and the defendants are entitled to be acquitted. *Rex v. Inhab. of St. Weonard's*, 582

3. In an indictment for non-repair of a highway, it is not necessary to state the *termini*; but, if they are stated, they must be proved. *Ibid.*

HORSE-STEALING.

A. had agisted his horse with B., who lived fourteen miles from him, and in consequence of hearing of the loss of it he went to the field of B., where it was not:—*Held* to be not sufficient proof of loss to support an indictment for horse-stealing. *Rex v. Yend*, 176

HOUSE-BREAKING.

A. broke into a house, and took two half sovereigns from a bureau, which he, being disturbed, threw under the grate in the same room:—*Held*, that this was sufficient to constitute the felony of breaking into a house and stealing, within the stat. 7 & 8 Geo. 4, c. 29, s. 12. *Rex v. Amier*, 344

HUSBAND AND WIFE.

See Evidence, 5.

An officer in the army, being required to join his regiment in the East Indies, left his wife in England, and settled a certain sum upon her, which was regularly paid:—*Held*, in an action by a tradesman for goods delivered at the house in which the wife was living, that it was not to be treated as a case of separation; but that the questions for the jury were, 1st, whether the goods supplied were necessaries, considering the condition in life of the husband; 2ndly, whether the sum of money settled was sufficient; and, 3rdly, whether it was or was not notorious in the neighbourhood that the wife was living in a style not justified by the rank of her husband: and the jury having found the first question in the negative, and the others in the affirmative, it was held that the verdict must be for the defendant. *Dennys v. Sargeant*, 419

IMPRISONMENT.

See False Imprisonment.

INDICTMENT.

See AUTREFOIS CONVICT. — EVIDENCE, 11, 13. — FALSE PRETENCES, 2. — FORGERY, 2, 3, 5, 8. — MURDER, 1, 5, 8. — NUISANCE, 8. — PERJURY, 3, 4. — PLEA. — SESSIONS. — SHEEP STEALING.

1. A party cannot be legally convicted upon an indictment found by the grand jury upon the testimony of witnesses, who were sworn by an officer of the Court after the session had lapsed, in consequence of its having on two successive days been opened and adjourned without the presence of any justices. *Middlesex Special Commission*, 90

2. An indictment for larceny had the words "London to wit" in the margin, and described the prisoner as "late of London," and charged the offence to have been committed in the "Parish of St. Mary-le-Bow," without averring that parish to be in London: — *Held* bad, and that this was not aided by the 7 Geo. 4, c. 64, s. 20. *Rex v. Hart*, 123

3. A count, which charges B. with shooting at A., with intent to murder him, and then charges C. and D. with aiding and abetting B., and at the end of the count concludes with a contra formam statuti, is good; and it need not state that B. shot A. with intent, &c., contra formam statuti, and that C. and D. aided him, also contra formam statuti. *Rex v. Nelmes*, 347

4. A. was indicted for stealing the property of Richard P. It appeared that the prosecutor's name was Richard Jeremiah P., but that he was generally known by the name of Richard P.: — *Held*, sufficient. *Rex v. —*, 408

INFANT.

1. If a person of full age orders clothes, however extravagantly and absurdly, and they are delivered to him, he is bound to pay for them; but with a minor it is otherwise. A

minor is only liable for necessaries suitable to his estate and degree, and the jury must consider not only whether the clothes were suitable in point of quality, but also in point of quantity. *Burghart v. Angerstein*, 690

2. If a minor has been supplied with ten coats by another tradesman, and immediately after that the plaintiff supplied him with another, the plaintiff will not be entitled to be paid for that other coat, as it was unnecessary. *Ibid.*

3. If a minor is supplied with necessaries suitable to his estate and degree, no matter from what quarter, a tradesman cannot recover for any further supply made to the minor just after. *Ibid.*

4. In an action for the price of clothes brought by a tailor against a minor, the defendant may go into evidence to shew that he had all the clothes which were suitable to his estate and degree from other tailors; and if he, in fact, had such clothes from them, it makes no difference that he has not paid for them, or even that he has successfully defended an action brought by one of them to recover the price of the clothes supplied by him. *Ibid.*

5. An entry in the baptismal register, that the defendant was born on a day there mentioned is no evidence of that fact. *Ibid.*

6. Forms of pleadings. *Ibid.*

INSOLVENT.

1. If a party, who takes the benefit of the Insolvent Debtors' Act, is induced by his attorney to omit out of his schedule a debt due from him to the attorney, and by such procurement the debt is omitted out of the schedule, the attorney cannot afterwards recover that debt from the party in an action. *Howard v. Bartolozzi*, 13

2. The service of the notices required to be given by a creditor who

JURY, DISCHARGE OF.

seeks to bring up a debtor under the compulsory clause in the Lords' Act, 32 Geo. 2, c. 28, s. 16, may be proved by a witness *vidé voce*, and need not be proved by affidavit. *Secus*, with respect to the notices to be given by the prisoner. *Ex parte Rolfe*, 406
3. Forms of pleas. 667

INSURANCE.

A policy of insurance on the life of another person, who, at the time of the insurance, is in a good state of health, is not vitiated by the non-communication by such person of the fact of his having, a few years before, been afflicted with a disorder tending to shorten life, if it appear that the disorder was of such a character as to prevent the party from being conscious of what had happened to him while suffering under it. *Swete v. Fairlie*, 1

INTEREST.

See DEBT, 4.

INTERPLEADER.

See ASSIGNMENT.

Where the declaration in an issue under the Interpleader Act states that "divers goods and chattels" were seized under a *fi. fa.*, and avers that "the said goods and chattels" were the property of the plaintiff, unless the plaintiff proves that the whole of the goods belong to him, the defendant will be entitled to a verdict; but *semble*, that, if part of the goods belonged to the plaintiff, the Judge would ask the jury to find specially. *Morewood v. Wilkes*, 144

JUDGMENT ON THE STAT. 2 & 3 WILL. 4, c. 42.

See AUCTION, 2.—*WATERCOURSE*, 2.

JURY, DISCHARGE OF.

1. If, after the jury are sworn, it

LANDLORD AND TENANT. 833

be discovered, that, to a declaration in trover, the defendant has pleaded non assumpsit, the Judge will discharge the jury, unless both parties consent to an amendment. *Bent v. Benyon*, 217

2. The Judge in an undefended cause, where the plaintiff could not get on for want of a written agreement, discharged the jury, and allowed the record to be withdrawn, in order to save expense to the parties. *Bonsor v. Element*, 230

JUSTICES IN EYRE.

See EVIDENCE, 20.

LANDLORD AND TENANT.

See EJECTMENT, 1, 2, 3.—*EVIDENCE*, 3.
—*TROVER*, 4.

1. If a person has held under the terms of a lease, and holds over after the lease is at an end, he is bound by the terms of it, although no new bargain to that effect is entered into between the parties; but if he comes in as an under-tenant, before any lease was granted to the person of whom he took the premises, and that person afterwards take a lease, if there is no evidence that he knew of the lease, it will be for the jury to say whether he is not an under-tenant, and not an assignee of the lease. *Torriano v. Young*, 8

2. If an assignee of a lease commit waste, the landlord may sue him in covenant, or in a special action on the case, but not in assumpsit. *Ibid.*

3. A tenant from year to year is not liable for permissive waste, and is not liable to make good wear and tear of the premises. *Ibid.*

4. A tenant of apartments is not justified in quitting without notice, merely from a fear, however reasonable, that his goods may be seized for his landlord's rent. *Rickett v. Tullick*, 66

5. If goods be distrained for rent,

the landlord must wait five whole days, i. e. five times twenty-four hours before he sells, and if he does not, he is liable to an action. Thus, where a distress was made on Friday at two P. M., and the sale was on the following Wednesday at eleven A. M., the sale was *held* to be wrongful. *Harper v. Taswell*, 166

6. A covenant for a landlord to be allowed to come into a house to see the state of its repair at "convenient times," is not broken by his not being allowed to go into some of the rooms, if he has given no notice of his coming. *Doe d. Wetherell v. Bird*, 195

7. A covenant by a lessee, that he will, during the term, repair, uphold, support, sustain, and maintain the brick walls to the demised premises belonging, is broken, if the lessee, during the term, pull down a brick wall which divides the court yard at the front of the house from another yard at the side of the house. *Ibid.*

8. A covenant not to remove or grub up trees is broken by removing trees from one part of the premises to another; and so it is by taking away trees, even if the lessee plant a greater quantity than he takes away, unless those taken away were dead. *Ibid.*

9. If A., the tenant of B., has paid all his rent, and got his landlord's receipt for it, but, fearing that his goods will be taken on legal process, agree with his landlord to destroy the receipt, and that the latter shall put in a distress for rent to protect the goods, and the landlord do so, and sell the goods, and keep the proceeds:—This distress is good as between A. and B., though void as against a third person, and A. can maintain no action against B. for it. But if B. sold some articles not included in the inventory of the distress, A. may maintain an action in respect of these articles. *Sims v. Tuffs*, 207

10. If a lessor, who has only an equitable title, grants a lease, he has,

as against his lessee, a good title by estoppel; but if, after the lease, the lessor, by a mortgage deed, grants all his interest in law and in equity to a mortgagee, the lessee may give in evidence this deed, and thus prevent the lessor from recovering in ejectment on a forfeiture of the lease. *Doe d. Marriott v. Edwards*, 208

11. If a tenant from year to year give a notice to quit, not expiring with the year, the landlord, if the notice be in writing, and signed by the tenant, may, if he pleases, treat this irregular notice as a surrender of the tenancy. *Aldenburgh v. Peaple*, 212

12. A landlord cannot justify making a distress for rent after dark. *Ibid.*

13. In actions for irregular distresses for rent, the correct practice is to make either the landlord alone, or the landlord and the broker defendants, and not to join appraisers, &c.; and if a plaintiff do join them, the Judge will oblige him to make out his case by strict rule, and not allow questions to be put to a witness who has been cross-examined, or a witness to be called back, with a view of fixing such appraisers, &c. *Child v. Chamberlain*, 213

14. The stat. Westminster 2, c. 37, which requires distresses to be made by brokers sworn and known, does not extend to distresses for rent. *Ibid.*

15. In an action for an irregular distress, the only evidence at all affecting K., the landlord, was, that all the defendants appeared by the same attorney, and that the defendant's attorney had given the plaintiff notice to produce "the notice of distress for rent due to Mr. K.;" and that the managing clerk of the defendant's attorney, when he served it, had offered 10*l.* to settle the action:—*Held*, that this was not evidence to go to the jury as against K.; and the Judge therefore directed the acquittal of K. *Crabb v. Killick*, 216

16. In trespass for taking goods under a distress for rent, if they have been clandestinely removed, and are afterwards seized, the defence must be pleaded specially, as the statute 11 Geo. 2, c. 19, s. 21, does not apply to such a case. *Postman v. Harrell*, 225

17. A landlord has no right to follow, and take under a distress for rent, the goods of a lodger which have been taken off the premises, but only those of his own immediate tenant. *Ibid.*

18. If a tenancy of a house be determined, and the tenant has promised to leave on a particular day, but afterwards refuses to do so, the landlord is not justified in putting the tenant's wife by force out of the house, and putting the tenant's furniture into the street; but if the tenancy be determined, and the tenant and his family be gone away and the house locked up, no one being in possession, the landlord would be justified in breaking into the house and obtaining possession. *Hillary v. Gay*, 284

19. A broker's man having taken possession of property under a distress for rent, after remaining two days left the house in a state of excitement bordering on insanity. The landlord thinking that his leaving had been procured by the drugging of his liquor by the parties in the house, but which was not proved, six days after broke into the house and took away the goods, without any previous demand of admission:—*Held*, that he had no right to enter again after so long a delay, and that the owner of the goods might maintain trover for them. *Russell v. Rider*, 416

20. If a tenant makes an encroachment adjoining to the farm he rents, this encroachment will be for the benefit of his landlord, unless it appear clearly from some act done at the time that the tenant in-

tended to make the encroachment for his own benefit, and not to hold it as he held the farm. *Doe d. Lewis v. Rees*, 610

21. A lease contained a proviso for re-entry, if the lessee, "his executors or administrators, or either of them," should become bankrupt. The executor of the lessee became bankrupt:—*Held*, that the landlord was entitled to recover in ejectment, although a term vested in a person as executor does not on his bankruptcy pass to the assignees. *Doe d. Williams v. Davies*, 614

22. Since the stat. 57 Geo. 3, c. 93, where there is a distress for rent, not exceeding 20*l.* in amount, there need be only one sworn appraiser. *Fletcher v. Saunders*, 747

23. *Semble*, that it is necessary that goods seized under a distress for rent should be appraised by two sworn appraisers, under 2 W. & M. sess. 1, c. 5, s. 2, notwithstanding the schedule of the stat. 57 Geo. 3, c. 93, directs that for an appraisal under 20*l.*, whether "by one broker or more," shall be charged only 6*d.* in the pound on the value of the goods. *Bishop v. Bryant*, 484

24. If the tenant, to save expense, requests that appraisers may not be called in, and in consequence the broker who made the seizure values the goods, the tenant cannot, in an action, complain of that which was done as an irregularity. *Ibid.*

25. If goods are removed by the landlord, which were not taken originally under the distress, nor included in the inventory, because they were not discovered at the time, the tenant may maintain trover for them. *Ibid.*

26. In making a distress for rent, circumstances may occur which may require the presence of a police officer; but, to justify the landlord in calling him in, it must be shewn that his presence was rendered necessary,

either from threats of resistance, or the apprehension of violence, &c. *Skidmore v. Booth*, 777

27. If a landlord be lawfully on his tenant's premises for the purpose of making a distress, he may put up a bill in the window for the purpose of letting them, without thereby making himself liable as a trespasser.

Ibid.

LARCENY.

See INDICTMENT.—POST OFFICE.—PRINCIPAL AND ACCESSORY.

1. A., in consequence of seeing an advertisement, applied to B. to raise money for him. B. said he would procure him 5000*l.*, and produced from his pocket-book ten blank 6*s.* bill stamps, across each of which A. wrote, "accepted, payable at Messrs. P. & Co., 189, Fleet Street, London," and signed his name. B., who was present, took up the stamps, and nothing was said as to what was to be done with them. Afterwards, bills of exchange for 500*l.* each were drawn on these stamps, and B. put them into circulation:—*Held*, that these stamps, with the acceptances thus written upon them, were neither "bills of exchange," "orders for the payment of money," nor "securities for money;" and *held*, also, that a charge of larceny against B. for stealing the stamps, and for stealing the paper on which the stamps were, could not be sustained, as this was no larceny. *Rex v. Hart*, 106

2. If a person picks up a thing when he knows that he can immediately find the owner, and, instead of restoring it to the owner, converts it to his own use, this is a larceny. *Rex v. Pope*, 346

3. A. went to a shop, and asked a boy there to give him change for a half-crown; the boy gave him two shillings and six pennyworth of copper. The prisoner held out a half-

crown, which the boy touched, but never got hold of, and the prisoner ran away with the two shillings and the copper:—*Held*, a larceny of the two shillings and the copper. *Rex v. Williams*, 390

LARCENY IN A DWELLING-HOUSE.

See HOUSEBREAKING.

Stealing in a bed-room over a stable in a yard, not under the same roof, nor having any direct communication with the house in which the prosecutor resides, cannot be properly charged as a stealing in his dwelling-house. *Rex v. Turner*, 407

LEASE.

See LANDLORD AND TENANT, 1, 2, 6, 7, 8, 21.

LIBEL.

See BEGIN, RIGHT TO, 1.—SLANDER.

1. A libel stated, that there was a riot at C., and that a person fired a pistol at an assemblage of persons, and upon this imputed neglect of duty to the magistrates:—*Held*, that, on the trial of a criminal information for this libel on the magistrates, the defendant's counsel, with a view of shewing that the libel did not exceed the bounds of free discussion, could not go into evidence to prove that there was in fact a riot, and that a pistol was in fact fired at the people. *Rex v. Brigstock*, 184

2. Where one newspaper copied a libellous paragraph from another, adding the word "fudge" at the close:—*Held*, in an action by the party libelled against the publisher of the paper in which the word "fudge" was added, that it was for the jury to say whether the object was to vindicate the character of the party by the addition of the word, or whether it was only introduced for the purpose of creating an argument in case pro-

ceedings should be afterwards taken.

Hunt v. Algar, 245

3. A libel purported to be a report of what occurred before one of his Majesty's commissioners of inquiry respecting corporations:—*Held*, that the defendant could not give evidence of the accuracy of the report as a matter of justification, but that he might give such evidence in mitigation of damages:—*Held*, also, that, if he did so, the plaintiff might give evidence in reply, to shew the inaccuracy of the report. *Charlton v. Watton*, 385

4. A libel contained in an advertisement by two tradesmen in partnership, stating that they deemed it necessary to caution their friends against a *fraudulent representation* that any part of *their business had been removed*, it being obvious that their concern was still carried on solely at No. 9, *Mansion House Street*, and that they had no connection with a shop recently opened in another place under circumstances *grossly misrepresented, and highly discreditable*, with a view of *defrauding* them of a part of their business, is not justified by proof that the person alluded to (who had been for several years in partnership with them) had issued a bill, in which, after thanking his friends for their favours during his residence at No. 9, *opposite the Mansion House*, he stated that he had *removed his establishment* to another place, where the business would be carried on under the firm of R. R. C. & Co.; and, in addition to this, had put over his shop door, "R. R. C. & Co., removed from *opposite the Mansion House*." *Chubb v. Flannagan*, 431

5. If the publication of a libel consists in merely selling a few copies of a periodical, in which, *inter alia*, it is contained, one question for the jury is, did the parties know what they were selling. *Ibid.*

6. On the trial of an action against the publisher of a monthly periodical for a libel contained in it, articles published from month to month alluding to the action, and attacking the plaintiff, are receivable as evidence *quo animo* the libel was published, and as shewing that the publisher of the work considered it as applying to the plaintiff. *Chubb v. Westley*, 436

7. In an action for libel, to support a plea of justification stating that the plaintiff had forged and uttered, knowing it to be forged, a certain bill of exchange, to justify a verdict for the defendant, the same evidence must be given as would be necessary to convict the plaintiff if he were on trial for those offences; but if the evidence falls short of satisfying the jury that the strict legal offence was committed, they may take the facts proved into their consideration in estimating the damages. *Chalmers v. Shackell*, 475

8. If the declaration in case for a libel state, *inter alia*, that at a certain place certain meetings for the promotion of sedition and blasphemy had been held, and that the defendant published of and concerning the plaintiff, and of and concerning the other matters, and of and concerning the said meetings, a libel charging him among other things with having taken the chair at the said place, but not saying any thing of the character of the meetings there, it will not be ground of nonsuit should the plaintiff at the trial fail to prove that the meetings were such as he described in his inducement. *Ibid.*

9. A letter written to the postmaster-general, or to the secretary to the General Post-office, complaining of misconduct in a postmaster, is not a libel, if it was written as a *bond fide* complaint to obtain redress for a grievance that the party really believed he had suffered; and particular

expressions are not to be too strictly scrutinized, if the intention of the defendant was good. *Woodward v. Lander*, 548

LIEN.

1. A. put a phaeton into the possession of M. for him to paint it, and paid M. beforehand for the painting. M. never painted it, but placed it on the premises of B., where it stood three months:—*Held*, that B. had no lien on the phaeton for his charge for the standing of it, unless the jury were satisfied that M. placed it there by the authority of A. *Buxton v. Baughan*, 674

2. A person has no right to keep the property of another and charge for the standing of it, unless there was a previous bargain between him and the owner of the property, or between him and some agent authorized by the owner. *Ibid.*

3. The widow of a publican employed an undertaker to conduct the funeral of the deceased, and deposited with him the beer and spirit licences of the house as a security for the payment of his bill. A., one of the firm of the distillers who supplied the house with spirits, by arrangement with the widow, took out administration. B., the other partner in the firm, promised the undertaker, that, if he would give up the licences to him, he would pay the bill for the funeral:—*Held*, that the undertaker, having given up the licences to B., might recover the amount of the bill against B., although the widow was his original employer, and although he had made out his account charging the administrator as his debtor. *Walker v. Taylor*, 752

LIS MOTA.

See EVIDENCE, 26.

LORDS' ACT.

See INSOLVENT, 2.

MALICIOUS PROSECUTION.

1. In an action on the case for laying a complaint before a magistrate of threatening language, in consequence of which the plaintiff was taken into custody and imprisoned till he found bail, if it appear that the threat was used in consequence of a private dispute, and was not uttered to the defendant, but related to him by a servant, who gave evidence of it before the magistrate, the question for the jury will be, whether the defendant acted *bond fide* upon the threat mentioned to him, or merely used it as a pretext for accomplishing his own private purposes. *Venafray v. Johnson*, 50

2. A person convicted of a trespass under the Game Act, 1 & 2 Will. 4, c. 32, underwent the sentence of imprisonment under that conviction, and did not appeal against it:—*Held*, that that conviction was an answer to an action against the informer for a malicious prosecution. *Mellor v. Baddeley*, 374

3. To maintain an action against a person for having made a false charge of felony before a magistrate, it is not necessary to shew that the charge was taken down in writing and acted upon by the magistrate. But it is necessary that the jury should be satisfied that it was made to the magistrate, with a view to induce him to entertain it as a charge of felony. *Clarke v. Postan*, 423

MANSLAUGHTER.

See MURDER.

1. All persons who by their presence encourage a fight from which death ensues to one of the combatants are guilty of manslaughter, although they neither say nor do any thing. But if the death be caused not by blows given in the fight itself, but by other parties breaking the ring, and striking the deceased with bludgeons, the persons who merely encouraged the fight

MANSLAUGHTER.

by their presence are not answerable.
Rex v. Murphy, 103

2. In a case of manslaughter, after the jury were charged, it was ascertained that the surgeon who examined the body was absent. The prisoner's counsel asked that the jury should be discharged:—*Held*, that, if the prisoner asked that the jury should be discharged, the Judge had authority to order it to be done. *Rex v. Stokes*, 151

3. A. was charged with manslaughter in killing B., by driving a cabriolet over him. C. saw the cabriolet drive by, but did not see the accident, and immediately afterwards, on hearing B. groan, C. went up to him, when B. made a statement as to how the accident had happened:—*Held*, that this statement was receivable in evidence on the trial of A. for the manslaughter of B. *Rex v. Foster*, 325

4. A., being on board a ship, and B. in a boat alongside, had a dispute about payment for some goods, both being intoxicated. A., to get rid of B., pushed away the boat with his foot; B., reaching out to lay hold of a barge, to prevent his boat from drifting away, overbalanced himself, and fell into the water and was drowned. A. was charged with manslaughter, on the coroner's inquisition:—*Held*, on the trial, that these facts did not constitute that offence. *Rex v. Waters*, 328

5. In order to render a declaration in articulo mortis admissible in a case of manslaughter, it is not necessary to prove expressions of the deceased, that he was in apprehension of almost immediate death, but the Judge will consider from all the circumstances whether the deceased had or had not any hope of recovery. *Rex v. Bonner*, 386

6. If A. and B. be riding fast along a highway (as if racing), and A. ride by without doing any mischief,

MASTER AND SERVANT. 839

but B. rides against the horse of C., whereby C. is thrown and killed, this is not manslaughter in A. *Rex v. Mastin*, 396

7. A foot-passenger was walking at lamp-light in the carriage road along a public highway, when the owner of a cart, who was proved to be near-sighted, drove along, at the rate of eight or nine miles an hour, sitting at the time on a few sacks laid on the bottom of the cart, and ran over the foot-passenger, and killed him:—*Held*, that he was guilty of such carelessness as amounted to the crime of manslaughter. *Rex v. Grout*, 629

MARRIAGE, BREACH OF PROMISE OF.

See ADULTERY, 2.

MASTER AND SERVANT.

1. If a yearly servant be dismissed by his master before the year expires, for such misconduct as will justify his dismissal, the servant is not entitled to any wages for the time during which he served. *Turner v. Robinsons*, 15

2. A. was clerk to B. from the year 1829. In 1832, C. gave a bond for the faithful conduct of A. as such clerk. After that, B. dismissed A., and after his dismissal A. made an admission of various sums that he had not accounted for:—*Held*, that in an action on the bond this admission was not evidence against C., as A. was living at the time of the trial, and might have been called as a witness:—*Held*, also, that it appearing that one item in the admission was of a sum received by A. before the date of the bond, C. would not be liable to the amount of the admission, although it had been shewn to him, and he had said that B. must get what he could of A., and he (C.) would pay the rest. *Smith v. Whittingham*, 78

MEETING, ILLEGAL.

See RIOR, 1, 2.

MISDEMEANOUR.

An attempt to commit a misdemeanour created by statute is itself a misdemeanour. A count in an indictment charged that a defendant "did attempt to assault" a girl, "by soliciting and inducing her" to place herself in an indecent attitude, he doing the like:—*Held*, that such a count was bad. *Rex v. Butler*, 368

MONEY FOUND ON AN ACCUSED PERSON.

If a person, taken on a charge of stealing a horse, have the horse in his possession when he is apprehended, any money found upon him ought not to be taken away from him. *Rex v. Jones*, 348

MORTGAGE.

See UNDERTAKING.

MURDER.

See CONFESSION, 4.—MANSLAUGHTER.

1. The deceased was a child twelve days old. It was not suggested that it had been baptized, but the prisoner, its mother, had said that she should like to have the child named "Mary Anne;" and, on two occasions afterwards, called the child "Mary Anne," and, on another occasion, "Little Mary." The prisoner's master, who was the father of the child, had stated to one of the witnesses for the prosecution that he was a Baptist. The indictment alleged the child to be "a certain female child, whose name to the jurors was unknown." The prisoner was convicted, and the fifteen Judges held the conviction right. *Rex v. Smith*, 151

2. In a case of death by stabbing, if the jury are of opinion that the

wound was given by the prisoner while smarting under a provocation so recent and so strong, that the prisoner might be considered as not being at the moment the master of his own understanding, the offence will be manslaughter; but if there had been, after the provocation, sufficient time for the blood to cool, and for reason to resume its seat before the mortal wound was given, the offence will amount to murder; and if the prisoner displayed thought, contrivance, and design, in the mode of possessing himself of the weapon, and again replacing it immediately after the blow was struck, such exercise of contrivance and design denotes rather the presence of judgment and reason than of violent and ungovernable passion. *Rex v. Hayward*, 157

3. Any hope of recovery, however slight, existing in the mind of the deceased, at the time of his making a declaration, will render it inadmissible as a declaration in articulo mortis; but where a deceased knew that he must die, and the magistrate, previous to his declaration, desired him, as a dying man to tell the truth, and he replied that he would:—*Held*, that his declarations were admissible. *Ibid.*

4. A child must be actually wholly in the world, in a living state, to be the subject of a charge of murder; but if it is wholly born, and is alive, it is not essential that it should have breathed; but the jury must be satisfied that the child was wholly born into the world at the time it was killed, or they ought not to convict the prisoner of murder. *Rex v. Brain*, 349

5. In an indictment for murder, where the death is alleged to have been caused by a wound, it is not necessary to describe either the length, breadth, or depth of such wound. *Rex v. Tomlinson*, 370

6. If two persons fight, and one overpower the other, and knock him

down, and put a rope round his neck, and strangle him, this will be murder.

Rex v. Shaw, 372

7. A servant of Mr. C. attempted to apprehend A., who was out at night poaching in a wood, and he was killed by A. Mr. C. was neither the owner nor the occupier of the wood, nor the lord of the manor, he having only the permission of the owner to preserve game there:—*Held*, that this was manslaughter only in A. *Rex v. Addis*, 338

8. The indictment charged that the offence had been committed by cutting the throat of the deceased:—*Held*, that the "throat" means what is commonly so called, and that this allegation was proved by shewing that the jugular vein was divided, although the carotid artery was not cut, and although the surgeon stated that what he should call the throat was not cut. *Rex v. Edwards*, 401

MUSIC ROOM.

1. A room used for public music or dancing is within the stat. 25 Geo. 2, c. 36, although it is not exclusively used for those purposes, and although no money be taken for admission; but the mere accidental or occasional use of a room for either or both those purposes will not be within that statute. *Gregory v. Tuffs*, 271

2. Proof that there is nothing painted on the house denoting that it is licensed under that statute, is sufficient *prima facie* evidence, in an action for penalties, that it is unlicensed. *Ibid.*

3. If a room be continually used for the purpose of music and dancing, it will be for the jury to say whether it is not kept for those purposes; and a room kept for drinking, music, and dancing, is within the stat. 25 Geo. 2, c. 36. *Gregory v. Tavernor*, 280

NEGLIGENCE.

See WITNESS, 8, 9.

1. Where, through negligent and careless driving, one vehicle is caused forcibly to strike against another, an action on the case is maintainable for the injury done, although it be immediate upon the violence, unless the act producing it be a wilful act. *Williams v. Holland*, 23

2. If an injury be occasioned *partly* by the negligence of the plaintiff, and *partly* by that of the defendant, the plaintiff cannot maintain any action. *Ibid.*

3. If a servant driving his master's cart, on his master's business, make a detour from the direct road for some purpose of his own, his master will be answerable in damages for any injury occasioned by his careless driving while so out of his road. But if a servant take his master's cart without leave, at a time when it is not wanted for the purposes of business, and drive it about solely for his own purposes, the master will not be answerable for any injury he may do. *Joel v. Morrison*, 501

4. A. had let a horse and gig to B. for a journey. B. afterwards desired C. to drive it back for him, and return it to A.; as C. was doing so, the defendant negligently drove his gig against the horse of A. and killed it:—*Held*, that, in an action brought by A. for the injury to his reversionary interest in the horse, C. was not a competent witness for the plaintiff without a release. *Heming v. English*, 542

5. In an action for damage done to the plaintiff's horse and cart by the negligent driving of the defendant's servant, the plaintiff's servant, who was driving his cart at the time of the accident, is not a competent witness for the plaintiff without a release; and the stat. 3 & 4 Will. 4, c. 42, s. 26, has made no alteration in

the law on this point. *Harding v. Cobley*, 664

6. Where a public company has the right by law of taking up the pavement of the street for the purpose of laying down pipes, the workmen they employ are bound to use such care and caution in doing the work as will protect the King's subjects (themselves using reasonable care) from injury. And if they so lay the stones as to give such an appearance of security as would induce a careful person, using reasonable caution, to tread upon them as safe, when in fact they are not so, the company will be answerable in damages for any injury such person may sustain in consequence. *Drew v. New River Company*, 754

NUISANCE.

1. In an indictment against a gas company for a nuisance, in conveying the refuse of gas into a great public river, whereby the fish are destroyed, and the water is rendered unfit for drink, &c., the question for the jury is, whether the special acts of the particular company complained of amount to a nuisance. *Rex v. Medley*, 292

2. The circumstance, that, by the diminution of fish, a considerable number of fishermen are thrown out of employ, is not of itself sufficient ground to sustain such an indictment. *Ibid.*

3. The directors are answerable for an act done by their superintendent and engineer, under a general authority to manage the works, though they are personally ignorant of the particular plan adopted, and though such plan be a departure from the original and understood method, which the directors had no reason to suppose was discontinued. *Ibid.*

4. On the trial of an action for a nuisance, a witness for the plaintiff may be asked whether he has not heard the plaintiff say that he had preferred eight indictments against

OATH, UNLAWFUL.

the proprietors of the works, which in the present action were charged to be a nuisance. *David v. Grenfell*, 624

5. Held, also, that a witness might be asked what he had heard the plaintiff say when the plaintiff was examined as a witness on the trial of one of those indictments. *Ibid.*

6. If a party, having a house in a street, exhibit effigies at his windows, and thereby attract a crowd to look at them, which causes the footway to be obstructed, so that the public cannot pass as they ought to do, this is an indictable nuisance, and it is not at all essential that the effigies should be libellous; and, *semble*, that it is not necessary to shew that the crowd consisted of idle, disorderly, and dissolute persons. *Rex v. Carlile*, 686

7. Where a defendant, indicted for a nuisance, conducted his own case, the Judge, at the conclusion of the case on the part of the prosecution, warned him that, if he called a witness, or read any letter or paper not already in evidence, or opened new facts, the counsel for the prosecution would have a right to reply. *Ibid.*

8. Form of indictment. *Ibid.*

OATH, UNLAWFUL.

1. Where an oath was administered, that the party taking it should not make buttons under certain stated prices, and should keep all the secrets of the lodge:—*Held*, to be an administering of an unlawful oath within the statutes. *Rex v. Ball*, 568

2. The administering an oath or engagement to any person not to reveal the secrets of any association is an offence within those statutes. *Ibid.*

3. The provisions of stat. 37 Geo. 3, c. 123, which make it a felony to administer an unlawful oath, are not confined to oaths administered with either a mutinous or a seditious object. *Rex v. Brodribb*, 571

4. A party of sixteen persons were going out armed for the purpose of

PARISH HOUSE.

night poaching; before they went out the prisoner swore them all to secrecy:—*Held* a felony within that statute.

Ibid.

5. Where sixteen persons took the same unlawful oath, two or three at a time, all being present:—*Held*, that the person who administered it might be convicted on an indictment for administering “a certain oath to A., B., C., D., &c. (naming the whole sixteen persons).”

Ibid.

6. If the indictment state the oath to have been not to inform or give evidence against any person belonging to a confederacy of persons associated together “to do a certain illegal act,” this is sufficient without its being stated what the illegal act was.

Ibid.

7. If the oath administered was intended to make the parties to whom it was administered believe themselves under an engagement, it is equally within the statute whether the book on which they were sworn was a Testament or not.

Ibid.

8. An oath administered in an illegal society, by which the members of it are sworn to secrecy, is an unlawful oath within the stat. 37 Geo. 3, c. 123, which is not confined to oaths administered for the purposes of either sedition or mutiny. *Rex v. Lovelass*,

596

9. Every person who engages in an association, the members of which, in consequence of being so, take any oath not required by law, is guilty of an offence within the stat. 57 Geo. 3, c. 19, s. 25. *Rex v. Dixon*,

601

ONUS PROBANDI.

See BEGIN, RIGHT TO.

OVERSEER.

See POOR.

PARISH HOUSE.

See EVIDENCE, 28.

PERJURY.

843

PARISH REGISTER.

See EVIDENCE, 23, 24, 25.

PARTNERS.

A. had a claim on B., C., and D. Several months afterwards, B. signed a check for a larger sum, in the name of himself and C. and D., as his partners, which was proved to have passed through the hands of A., and to have been appropriated by him to his own purposes. A. died:—*Held*, in an action by his executors against the three partners for the original claim, that the check, *prima facie*, was evidence of payment; but, there being other circumstances from which a loan of its amount might be *inferred*, it was left to the jury to say whether it was a loan by B. alone, or by the partnership, although no memorandum or acknowledgment of any kind was produced, by which the executors could ascertain whether it was a loan. *Boswell v. Smith*,

60

PAYMENT.

See PARTNERS, 1.

PERJURY.

See EVIDENCE, 13.

1. A witness committed perjury at the Worcester county quarter sessions, which are held in the Guildhall of Worcester, which is situate in the county of the city of Worcester:—*Held*, that the indictment for this perjury might be preferred in the county of the city of Worcester. *Rex v. Jones*, 137

2. To prove perjury it is sufficient if the matter alleged to have been falsely sworn be disproved by one witness, if, in addition to the evidence of that witness, there be proof of an account or a letter written by the defendant contradicting his statement on oath. *Rex v. Mayhew*,

315

3. On the trial of an indictment for perjury, where the perjury was alleged to have been committed before a ma-

gistrate, the written deposition of the defendant taken down by the magistrate was put in to prove what he then swore. After this, it was proposed to call the attorney for the prosecution, to prove some other matters that the defendant then swore, which were not mentioned in the deposition:—*Held*, that this could not be done. *Rex v. Wyld*, 380

4. If in an indictment for perjury against C. D., it is averred that a cause was depending between A. B. and C. D., a notice of set-off intituled in a cause A. B. against C. D., and signed by the attorney of C. D., is not sufficient evidence to support the allegation. *Rex v. Stoveld*, 489

PLATE STAMP.

See STAMP, 1.

PLEA.

See ASSAULT, 1, 2.—AUTREFOIS CONVICT.—PLEADING.

1. The statute 7 & 8 Geo. 4, c. 28, s. 2, authorizing the Court to direct a plea of not guilty to be entered for a party who stands mute of malice, or will not answer directly to an indictment, applies to the case of a party who refuses to plead, on the ground that he has previously pleaded to another indictment for the same offence, but which indictment was not valid in consequence of its having been found upon the testimony of witnesses not duly sworn to give evidence before the grand jury. *Rex v. Bitton*, 92

2. A person who has pleaded to an indictment which was invalid, on account of its having been found upon the testimony of witnesses not duly sworn to give evidence, may be required to plead to another indictment for the same offence, without the first indictment being quashed by the Court. *Rex v. Chamberlain*, 95

POACHING.

PLEADING.

AMENDMENT. — APOTHECARY, 3. — AUCTION, 2. — BANKRUPT, 8. — BILL OF EXCHANGE, 12. — BOND, 1, 2. — DAMAGES. — DEBT, 2, 3, 4. — FALSE IMPRISONMENT, 5. — GOODS SOLD. — INFANT, 6. — INSOLVENT, 3. — POOR, 3. — TROVER, 2.

1. If a plaintiff bring an action on the case, and state in his declaration that the defendant wrongfully diverted water from his mill, and the defendant plead not guilty, this plea merely puts in issue the fact that the defendant did divert the water, and the plaintiff will be entitled to a verdict on this plea, although it be shewn that the plaintiff had no right to the water in respect of his mill as it was modern. *Frankum v. Earl of Falmouth*, 534

2. If in an action on a bill of exchange, where there is a plea that there was no consideration, it appear at the trial that the plaintiff has not put any replication on the record, the Judge will not allow a replication to be added at the assizes without the consent of the defendant, but will order the case to be struck out of the list. *Rowlinson v. Roantre*, 551

3. If a replication conclude to the country with an "&c.," and no *similiter* be added, the Judge will try the cause as the "&c." is sufficient. *Clark v. Nicholson*, 712

4. In an action of assumpsit for not completing the purchase of a house, the defendant cannot, under the general issue, set up as a defence that the sale was a sale by auction, and void on the ground of puffing, as this must be specially pleaded. *Icely v. Grew*, 671

POACHING.

See MURDER, 7.

To support an indictment for night poaching by three or more being armed, &c., it is not sufficient to prove that one of the prisoners was in the place laid in the indictment, and that

the rest of the party were in another wood which was separated from the place mentioned by a turnpike road. *Rex v. Domsell*, 398

POISONING.

If A. sends poison intending it for B. with intent to kill B., and it comes into the possession of C. who takes it, but does not die, A. may be indicted for a capital offence on the statute 9 Geo. 4, c. 31, s. 11. *Rex v. Lewis*, 161

POOR.

1. In replevin, the defendants avowed for a distress for poor's rate:—*Held*, that one of the defendants having acted as overseer of the poor was *prima facie* evidence that he was so:—*Held*, also, that, to let in secondary evidence of his appointment, it was sufficient proof of loss that a witness stated that he, at the desire of the attorney, had applied to the defendant for his appointment, and that he said that he had lost it, without proving any search made. *Bristol v. Wait*, 591

2. If a private act of Parliament direct that overseers shall be appointed "for the term of three years then next ensuing," *semble*, that an appointment "for the space of three years next ensuing the date hereof, or until other overseers shall be appointed," is bad. *Ibid*.

3. Form of plea of justification by overseers. 202

POSSESSION.

See TRESPASS, 1.

POST-OFFICE.

1. On an indictment for embezzlement against a letter-carrier, charged under 2 Will. 4, c. 4, as a person employed in the public service of his Majesty, it is not necessary to prove his appointment as a letter-carrier, but evidence of his having acted as such is sufficient. *Rex v. Borrett*, 124

2. If the wife of the party to whom

a letter is directed pays the postage of the letter, she is entitled to demand an overcharge made for it; and a refusal on the part of the letter-carrier to account for it to her, is evidence of an embezzlement by him. *Ibid*.

3. On the trial of a person on the stat. 52 Geo. 3, c. 143, s. 2, for embezzling a letter containing a bill of exchange, he being at the time employed under the Post-office, it is sufficient to prove that such person acted in the service of the Post-office, and it is not necessary to go into proof of his appointment. *Rex v. Rees*, 606

POSTPONING TRIAL.

The presentment of a bill for a capital offence may be postponed on affidavit of the attorney for the prosecution of the illness of a material and necessary witness, although such witness have been examined before a magistrate, and his deposition do not disclose matter of sufficient importance to shew that his evidence was necessary, as the important facts may have been discovered since. *Rex v. Palmer*, 652

PRACTICE.

See BAIL-BOND.—BEGIN, RIGHT TO.—EVIDENCE, 10, 16.—INSOLVENT, 2.—LANDLORD AND TENANT, 13.—MANSLAUGHTER, 2.—MONEY FOUND ON AN ACCUSED PERSON.—NUISANCE, 7.—PLEADING, 2, 3.—POSTPONING TRIAL.—PRINCIPAL AND ACCESSORY, 1.—RECEIVER, 3.—SPECIAL JURY.—THREATENING LETTER.—TRESPASS, 2.

1. Where in tort there are several defendants, if there be, at the close of the case for the plaintiff, no evidence against some of the defendants, the Judges have resolved that those defendants against whom there is no evidence shall be immediately acquitted, and that their acquittal shall not be delayed till the case of the other

defendants is gone into. *Child v. Chamberlain*, 213

2. The rule, with respect to defendants not fixed by the evidence, is, that the verdict in their favour is to be given at the close of the plaintiff's case. *Russell v. Rider*, 416

3. A defendant's counsel, in addressing the jury, has no right to say to the jury that he shall call witnesses, unless they inform him that they are satisfied that the defendant is entitled to a verdict as the case stands; he must either call his witnesses, or close his case, without saying any thing about them. *Moriarty v. Brooks*, 684

PRINCIPAL AND ACCESSARY.

See RECEIVERS.

1. A. was indicted for larceny, as a principal, B. being charged, in the same indictment, with having received the stolen property from A. B. was tried at the Clerkenwell Sessions for the receiving, and was convicted and sentenced to be transported. A. was afterwards tried at the Old Bailey as the principal, and acquitted:—*Held*, that, although B. was imprisoned in Newgate, in pursuance of his sentence, the Judges at the Old Bailey had no jurisdiction to order his discharge. *Ex parte Palmer*, 122

2. A., a lad, who was a clerk in a banking-house, robbed his employers, and after doing so, he went to the lodgings of B., who was much older than himself, and who had relations in America. A. stayed twenty minutes at B.'s lodgings, and after that, on the same night, A. and B. started together by the coach, and went from Reading to Liverpool, intending to embark for America:—*Held*, that on this evidence B. might be convicted as an accessary after the fact in harbouring, receiving, and maintaining the principal felon. *Rea v. Lee*, 536

PRINCIPAL AND AGENT.

A. sent to B.'s agent a list of prices

at which he would do work. B. wrote a letter to his agent, stating that he would agree to the prices, if A. would consent to be paid at stated periods, the first payment to be "in November." The agent shewed this letter to A., and said to him that he might consider the 100*l.* to be payable on the 1st of November. A. afterwards did the work for B. It was left to the jury to say, whether that which the agent said to A. formed a part of the actual contract between the parties, or whether it was a mere observation by the agent himself. *Knapp v. Harden*, 745

PRINTER.

See TRADE, USAGE OF.

PRIVILEGED COMMUNICATION.

See EVIDENCE, 12, 14, 15, 38.—
LIBEL, 9.—SLANDER, 2.

PROMOTIONS, 412, 807.

RABBITS.

Destroying rabbits in the night-time, in a rick-yard in which they were kept, is not a misdemeanour under the stat. 7 & 8 Geo. 4, c. 29, s. 30. *Rea v. Garrett*, 369

RAPE.

See MISDEMEANOUR.

1. In cases of rape, &c., the capital offence is completed if there be penetration, although there has been no emission, and the prisoner has been interrupted in the commission of the offence. *Rea v. Cozins*, 351

2. On the trial of an indictment for a rape the prosecutrix may be asked, whether, previously to the commission of the alleged offence, the prisoner has not had intercourse with her by her own consent. *Rea v. Martin*, 562

RECEIVERS.

1. In an indictment for the substantive felony of receiving stolen goods, an allegation that the goods were stolen "by a certain evil-disposed person" is good, without stating the name of the principal felon, or averring that he is unknown. *Rex v. Jervis*, 156

2. A. and B. were indicted for larceny as principals. A. had been sent by his master to deliver goods to C. He only delivered part, and the rest was stolen and found in the possession of B.:—*Held*, that it was a question for the jury, whether B. was present at the time when A. separated the portion stolen from the bulk, for that if he was, both were rightly charged as principals. *Rex v. Butteris*, 147

3. If prisoners be charged by several indictments with receiving stolen goods:—*Semble*, that, in strict law, any receiving that was before the one in the indictment which is being tried may be given in evidence, although itself the subject of another indictment; but, if given in evidence, the other indictment ought, as matter of candour, to be given up. *Rex v. Davis*, 177

4. It makes no difference whether a receiver receives for the purpose of profit or advantage, or whether he does it to assist the thief. *Ibid.*

5. If a receiver of stolen goods receive the property for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased it. *Rex v. Richardson*, 335

6. Stolen property being found concealed in an old engine-house, and, it being watched, the prisoners were seen taking it away:—*Held*, that, to warrant the conviction of the prisoners, on an indictment charging them as receivers, the jury must be satisfied that the property had been stolen by some other person to the knowledge of the prisoners, and that there should be some evidence to

shew that such was the case:—*Held*, also, that the evidence given in this case would warrant a conviction for the stealing. *Rex v. Densley*, 399

RECOGNIZANCE.

The Court at the Old Bailey, three of the Judges being present, refused to discharge, without the preferring of any bill, the recognizances of prosecutors, being members of a society for promoting religious knowledge among the poor, who had caused a servant to be committed for embezzlement, the application not being made on the ground of any defect in the evidence, but on the ground that they, the prosecutors, thought that the reformation of the offender would be best promoted by such a course. But where parish officers were under recognizances to prosecute a pauper for obtaining money under false pretences, a Judge at the assizes, on motion, permitted the recognizances to be withdrawn, the party having been in prison for several weeks, and the parish being unwilling to indict. *Rex v. Paul*, 323

RECORD ROLL.

See EVIDENCE, 20.

REGISTER, PARISH.

See EVIDENCE, 23, 24, 25.

RELEASE.

See NEGLIGENCE, 4, 5.—*WITNESS*, 13.

REPAIRS.

See LANDLORD AND TENANT, 1, 3, 7, 8.

If a tenant, who is bound to repair, leave, and at the end of the tenancy the premises be out of repair, the jury may give the landlord, in an action against the tenant, not only the amount of the actual expense of the repairs, but also a compensation for the loss of the use of the premises while they were undergoing repair. *Woods v. Pope*, 782

REPLICATION.

See PLEADING.

RIOT.

1. A riot is not the less a riot, nor is an illegal meeting the less an illegal meeting, because the proclamation from the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a capital offence if they do not disperse within an hour; but, if that proclamation be not read, the parties are guilty of the common law offence, which is a misdemeanour, and all magistrates, constables, and even private individuals, are justified in dispersing the offenders; and, if they cannot otherwise succeed in doing so, they may use force. Without any proclamation at all, if a meeting is illegal, a party who attends it, knowing it to be so, is guilty of an offence. *Rex v. Furse*, 81

2. A meeting called "to adopt preparatory measures for holding a national convention," is an illegal meeting. *Ibid.*

3. Every man has a right to work for the best price he can get; but, if others choose to work for less than the usual prices, the law will not permit that violence should be committed towards them, or towards those by whom they are employed, or those with whom they are connected. *Rex v. Batt*, 329

RIOTERS, INJURIES BY.

Where a party of coal-whippers, having a feeling of ill-will to a coal-lumper who paid less than the usual wages, created a mob, and riotously went to the house where he kept his pay-table, and cried out that they would murder him, and began to throw stones, brick-bats, &c., and broke windows and partitions, and part of a wall, and continued, after his escape, throwing stones at the house till they were compelled to de-

sist by the threats of the police:—*Held*, that they might be convicted of beginning to demolish, under the stat. 7 & 8 Geo. 4, c. 30, s. 8, though their principal object was to injure the lumper, provided it was also their object to demolish the house, either on account of its being used by him or his men, and though they had not any ill-will against the owner of the house personally. *Rex v. Batt*, 329

RULES.

The rules of pleading of H. T. 4 Will. 4, are part and parcel of the law of the land. *Roffey v. Smith*, 662

SACRILEGE.

A dissenting meeting-house is not within the statute 7 & 8 Geo. 4, c. 29, s. 10, which makes it a capital offence to "break and enter any church or chapel, and steal therein," &c. *Rex v. Richardson*, 335

SCHOOL.

1. The master of an ancient endowed school is entitled to the school house, unless he has been in due manner removed from his office by those having authority to do so. *Doe d. Coyle v. Cole*, 359

2. The neglecting of the scholars would be a good ground of amotion. *Ibid.*

3. The vicar of the parish cannot recover the school-house by ejectment, although it may have been built on what is evidently part of the churchyard, if it appear that the house was built on the site of a very old school-house, the site of which might have been granted before the disabling statutes; but if a part of the house is built on ground taken from the churchyard recently, the vicar may recover that part. *Ibid.*

4. Where a vicar brings ejectment claiming in right of his vicarage, a letter written by a former vicar is admissible in evidence for the defen-

dant; and a witness for the lessor of the plaintiff may be asked as to what is inscribed on a tablet fixed up in the church. *Ibid.*

SERVANT.

See MASTER AND SERVANT.

SESSIONS.

See EVIDENCE, 11, 13.

The justices of Middlesex, in addition to the four quarter and four general sessions which they had been previously in the habit of holding, appointed other original intermediate sessions:—*Held*, that they had a right to do so, and that an indictment found at one of such additional sessions was valid in point of law. *Rex v. Mullaney*, 96

SEWER.

See NEGLIGENCE, 6.

1. A surveyor, who gives directions in the progress of the work of making a sewer, is liable to an action for a penalty inflicted by an act of Parliament upon any person who alters, covers in, or arches over any drain, &c. contrary to the consent of trustees mentioned therein. *Woodward v. Cotton*, 491

2. The arching over an *old ditch of smaller dimensions* than were mentioned in a consent to the making of a sewer in writing by certain trustees under an act of Parliament, was held to be a breach of an enactment providing that no ditch, drain, or other water-course should be narrowed, filled up, altered, covered in, or arched over *without the consent* of such trustees, nor in any other manner than should be expressed in such consent. *Ibid.*

SHEEP-STEALING.

In an indictment for sheep-stealing, a *rig sheep* is properly described as "one sheep." *Rex v. Stroud*, 535

SHERIFF.

See EXECUTION.

1. A sheriff is not bound to exe-

cute a criminal who is sentenced to death in his county, if such criminal is not in his custody; and if it is intended by the Court which passed the sentence that the sheriff should do execution, there should be a special mandate to the party having the prisoner in custody to deliver him to the sheriff, and another to the sheriff to receive the prisoner, and execute him. *Rex v. Antrobus*, 784

2. On a question whether, by custom, a sheriff of the county is exempt from the duty of executing criminals in his county, and whether, by custom, the sheriffs of a city are bound to do it, evidence of reputation is not receivable. *Ibid.*

3. On the trial of an information against a sheriff for refusing to execute a criminal, the warrant to a former sheriff commanding him to gibbet an offender, and a craving by that sheriff of an allowance of his expenses in so doing, which were allowed by the Chancellor of the Exchequer, are receivable in evidence. *Ibid.*

SHIPPING.

1. In an agreement under seal for the hire of the cabins and accommodations for passengers in a ship, there was a stipulation, that, if it should be necessary for the convenience, and at the request of the hirer, to put into an intermediate port for stock or otherwise, he (the hirer) would pay all port and necessary charges consequent thereon:—*Held*, that this, in connection with covenants to promote the comfort and convenience of the hirer and his passengers, raised an implied covenant, on the part of the captain who let the cabins, &c., to put into any such port, if required. *Corbyn v. Leader*, 32

2. There was also a covenant on the part of the letter, to *permit and suffer* the hirer to stow away the baggage of the passengers in a part of the hold:—*Held*, that this fairly imported that there should be some demand or re-

quest made by the hirer for the clearing of the space agreed on. *Ibid.*

3. A covenant to keep up a supply of the necessary and usual quantity of water, for the use of passengers, &c., is not broken by a deficiency for a short time, occasioned by the unusual length of the voyage. *Ibid.*

4. It is the duty of the captain of a merchant vessel, in case of misconduct of one of the crew, previously to the infliction of punishment, to institute inquiry, with the assistance of others, and to have the result entered in the log. *Murray v. Moutrie*, 471

5. A seaman employed in cutting blubber on board a whaler, in consequence of a quarrel with the captain, followed by a blow from the mate, threw down his knife, and refused to do any more work in the ship:—*Held*, that such conduct was an offence justifying moderate punishment; and that, although the punishment were excessive, yet, if the seaman, by some concession, might have put an end to it, and refused, he could not recover damages for the continuation of the punishment after such refusal. *Ibid.*

SHOOTING.

See INDICTMENT, 3.

A. had the barrels of a double barrelled percussion gun detached from the stock and lock. By striking the percussion cap, which was on the nipple of one of the barrels, he fired it and shot B.:—*Held* to be within the stat. 9 Geo. 4, c. 34, ss. 11 and 12. *Rez v. Coates*, 394

SIMILITER.

See PLEADING, 3.

SLANDER.

See LIBEL.

1. The question in an action for words is not what the party using them considered their meaning, by any secret reservation in his own

mind, but what he meant to have understood as their meaning by the party to whom he uttered them. *Read v. Ambridge*, 308

2. The plaintiff, a dissenting minister, accompanied by a friend, went to the defendant, who, in answer to questions put by the plaintiff and his friend, stated that his (the defendant's) wife had been cautioned against the plaintiff as a drunkard, &c.:—*Held*, that this was a privileged communication, and that slanderous expressions used in it were not actionable, if the defendant spoke *bond fide*, and was not actuated by malice:—*Held*, also, that it was incumbent on the plaintiff to prove that the defendant was actuated by malicious motives. *Warr v. Jolly*, 497

3. If a defendant, in an action for verbal slander, at the time of speaking the slander gave up the name of the person from whom he heard it, this is no justification; but, if he did this, and at the trial prove that he did in fact hear the slander from that person, it will go in mitigation of damages. *Bennett v. Bennett*, 588

SOCIETY (ILLEGAL).

See OATH.

SPECIAL JURY, 1.

1. If a rule be obtained on Saturday to make a cause a special jury, which is marked as a special jury at two o'clock on that day, and notice of it is given to the plaintiff's attorney at seven o'clock on that evening, the cause being in the list for Monday, the Judge will try it in its order on Monday as a common jury cause, although there be an affidavit of merits. *Johnson v. Blackwell*, 236

2. *Semble*, that an action for a libel in a newspaper is a fit cause to be tried by a special jury if there be special pleas of justification, but not if the general issue only were pleaded. *Roberts v. Brown*, 757

STATUTE.

STABBING.

A. was indicted for stabbing B., there being another indictment against him for stabbing C.:—*Held*, that, on the trial of the indictment for stabbing B., both C. and the surgeon might be asked as to what kind of wound C. received, with a view of identifying the instrument used. *Rex v. Furzey*, 81

STAMP.

See BILL OF EXCHANGE, 9.

1. A person may be found guilty under the stats. 13 Geo. 3, c. 52, s. 14, and 38 Geo. 3, c. 69, s. 7, if he be proved to have transposed the mark of the Goldsmiths' Company from one gold ring to another, although both rings be genuine, and although the jury may be of opinion that he did so without any fraudulent intention. *Rex v. Ogden*, 631

2. If an instrument offered in evidence is objected to as being improperly stamped, the party offering it may either go into the rest of his evidence, and send the instrument to the Stamp Office to be stamped anew, taking the chance of its coming back sufficiently early, or his counsel may argue the objection taking the stamp as it is; but, if the instrument be sent away to the Stamp Office, the Judge will not allow any argument as to the original stamp being proper. *Beckwith v. Benner*, 681

STATUTE.

See EVIDENCE, 22.

A tender to be good must be unconditional, so that if the plaintiff take the money, and there be more due, he may still bring an action for the residue; therefore, where a plaintiff offered to take a sum tendered in part of his demand, and the defendant would only allow him to take it "as a settlement":—*Held*, not a good tender. *Mitchell v. King*, 237

TRADE, USAGE OF. 851

THREATENING LETTER.

If a party be indicted for sending a threatening letter, the Court will, on motion of the prisoner's counsel, as soon as the bill is found, order that the letter be deposited with the officer of the Court, that the prisoner's witnesses may inspect it. *Rex v. Harrie*, 150

TOLL.

See EVIDENCE, 18, 19, 20.—*USE AND OCCUPATION*.

1. In an action of debt by the lessee of the corporation of N. for toll traverse for a waggon, and a market toll for cattle, it was held that an information quo warranto by the Attorney-General of Queen Elizabeth against the corporation, in respect of the customs they claimed and used, was not receivable in evidence, as it did not appear that it was prosecuted, such an information, like an indictment, not being evidence, unless there be the finding of a jury upon it:—

Lancum v. Lovell, 437

2. *Held*, also, that an exemplification of a judgment in an action of trespass by the corporation, for setting up a stall in a market, with a justification pleaded of such right without paying toll, was not inadmissible, as it might connect itself with the issue in the progress of the cause. *Ibid.*

3. If the lessee of tolls under a corporation vary, by temporary agreement, the amount of toll claimed of individuals, it will not affect the right to the tolls, if it appear to have been a variation, not for the purpose of claiming more at one time than another, but for the convenience of both parties. *Ibid.*

TRADE, USAGE OF.

1. *Seemle*, that there is in fact a usage of trade between the printers and proprietors of newspapers, that the latter should give to the former four weeks' notice of taking the work from them, or pay them four weeks'

wages; but such usage seems not to be mutual. *Cunningham v. Fonblanque*, 44

2. An usage of trade must be proved by instances, and cannot be supported by evidence of opinion merely. *Ibid.*

TRANSPOSING STAMP.

See STAMP, 1.

TREATING.

See ELECTION.

TRESPASS.

See TROVER, 4.

1. A. hired a steam-boat for the day, to convey himself and others, not exceeding fifty in number, on an excursion. The captain, steward, and crew, were the servants of and paid by the proprietor. A stranger, not of the party, was allowed to come on board by the captain; and, being desired to quit, refused, whereupon A., with the assistance of others, removed him by force:—*Held*, that A. had not such possession of the vessel as justified them in so doing. *Dean v. Hogg*, 54

2. Trespass and expulsion against three, with a count for imprisonment. The expulsion having been proved against the three defendants, the plaintiff's counsel went into evidence of the imprisonment, but that appeared to have been by one of the defendants only:—*Held*, that the plaintiff's counsel could not abandon the first trespass proved against all three, and go on with the case as to the imprisonment by the one defendant alone. *Tait v. Harris*, 73

3. Under "Not guilty" in trespass, that only can be given in evidence which shews that the defendant did not do the act complained of. *Pearcy v. Walter*, 232

4. A. kept a shop, in the window of which goods were ticketed at certain prices. B. entered the shop and demanded one of the articles at the price marked, which the shopman refused to let him have, and desired

him to leave the shop. B. refused, and the shopman struck him. Upon this A. came into the shop, and gave B. into custody:—*Held*, that B. was a trespasser in remaining in the shop after he had been told to leave it by the agent of the owner:—*Held*, also, that A. was not liable for the assault committed by the shopmen before he came into the shop. *Timothy v. Simpson*, 499

5. If a person does not assist in a trespass, either in word or deed, he is not liable for it. *Ibid.*

TROVER.

See BILL OF EXCHANGE, 1.—JURY, DISCHARGE OF, 1.—LIEN.

1. A., having been bail for D., went accompanied by B. and C. to the lodgings of D., telling her that B. and C. were officers, who would take her to gaol if she did not give him security for his debt. B. and C. were not officers, and had no authority to take D. D. gave A. a number of articles, and signed a paper stating that the articles were deposited with A. for security, and that he might sell them if he was not paid in forty-two days:—*Held*, that D. might recover the value of the articles in trover; and that as B., C., and D. acted in concert, the verdict must pass against all three, although it appeared that C. and D. never had any of the goods. *Bloomfield v. Blake*, 75

2. If a defendant in trover plead that the goods "are not nor were the property" of the plaintiff, in manner and form as in the declaration is alleged, (concluding to the country), this will be taken to be an informal plea, traversing the allegation of the declaration, that the plaintiff "was possessed" of the goods "as of his own property;" and, therefore, on this plea, it will be a good defence to shew that the goods, though the property of the plaintiff, had been pledged by him as a security for money. *Samuel v. Morris*, 620

UNDERTAKING.

Whether this plea would not be bad on special demurrer—*quære?* *Ibid.*

3. A person having a bill to take up applied to a firm for assistance, who, not having cash, drew and indorsed a bill, and gave it to him to get discounted, that they might be able to lend him the money. The person so entrusted also indorsed the bill, and left it with a bill broker for discount. The bill broker, being indebted to a widow who carried on business as a coal merchant, took the bill to her counting-house and indorsed it, and there gave it to her son, who managed her business, and who entered it in her cash book as so much received on account. There was contradictory evidence as to the son's knowledge at the time he received the bill of the circumstances under which it had been obtained; but he, on being informed of them afterwards, refused to give the bill to the drawer, who brought an action of trover against him for it. The jury found that the bill was not taken *bond fide*, and without notice of the circumstances; and it was held that the action was maintainable against the son, and need not be brought against the mother. *Cranch v. White*, 767

4. If a tenant of land, during his tenancy, remove a dung heap, and, at the time of his so doing, digs into and removes virgin soil that is beneath it, the landlord may maintain either trespass de bonis asportatis or trover for the removal of the virgin soil. *Higgon v. Mortimer*. 616

UNDERTAKING.

A. gave an undertaking to pay C. 35*l.* upon the execution of a mortgage from S. to B. S. conveyed to B. the property intended to be the subject of the mortgage, by assigning it to him in trust to sell it, and for B. to pay himself the sum that he had advanced, and to pay 22*l.* to C. as part of his claim, and after other payments, which were specified, to pay the surplus to S.—C. was not only aware of this arrange-

WARRANT OF ATTORNEY. 853

ment, but was at one time intended to have been a trustee under the deed of assignment:—*Held*, that this conveyance was a mortgage within the meaning of the undertaking; but that C. could not recover, in an action on the undertaking, the 22*l.* mentioned in the deed, as he had allowed that to become a subject of the trusts. *Crook v. Beetham*, 761

UNLAWFUL OATH.

See OATH.

USAGE OF TRADE.

See TRADE, USAGE OF.

USE AND OCCUPATION.

1. A corporation aggregate may maintain assumpsit for the use and occupation of tolls, although they did not grant the tolls to the occupier by any instrument under their common seal. *The Mayor, &c. of Carmarthen v. Lewis*, 608

2. If a corporation aggregate sue for use and occupation of "standings, market-places, and sheds," and it appears that they allowed the defendant to take tolls from others who occupied sheds and standings, the Judge at the trial will allow the word "tolls" to be inserted in the declaration, the defendant paying the costs of the amendment. *Ibid.*

VERDICT.

Where the jury have returned a verdict, the Judge will not hear the reasons on which they founded their verdict, though the jury may desire to state their reasons. *Horner v. Watson*, 680

VICAR.

See SCHOOL, 3, 4.

VOIRE DIRE.

See WITNESS, 16.

WARRANT OF ATTORNEY.

A warrant of attorney is only an

answer to an action for money secured by it when judgment has been entered up on it. *Daivson v. Overend*, 222

WARRANTY.

See AMENDMENT, 2.

WASTE.

See LANDLORD AND TENANT, 1, 2, 3, 6, 7, 8.

WATERCOURSE.

See PLEADING, 1.

1. If water has been accustomed to flow along a channel from time immemorial, and it has been unappropriated, the first owner of the adjoining lands on both sides who appropriates it, without doing any injury to any one, either above or below him, acquires such a right by his appropriation, that, though he may not have enjoyed it for twenty years, he may maintain an action against any owner of the lands above him who wrongfully diverts the water from its ancient channel. *Frankum v. Earl of Falmouth*, 529

2. If a party, who has a right to the use of running water, as an owner of adjoining lands, has appropriated it, and by his declaration claim the right to it as the owner of a mill not twenty years old, this is bad, and the Judge at the trial will not allow it to be amended; and even if the jury find the plaintiff's right specially, and it be indorsed on the postea under the stat. 3 & 4 Will. 4, c. 42, s. 24, the Court above will not give judgment for the plaintiff on that finding, because if the plaintiff had stated his right properly, the defendant might have pleaded differently. *Ibid.*

WAY.

See HIGHWAY.

1. If there be a public footway with a stile across it of a certain height, no one has a right to remove the stile and put up a gate of greater height;

and the fact, that gates had been previously placed across other parts of the way will be no defence. *Bateman v. Burge*, 391

2. If there be an obstruction of a public way, and any person receives a special injury from it, he may maintain an action. *Ibid.*

WITNESS.

See EVIDENCE.—NEGIGENCE, 4, 5.

1. If a witness is incompetent on the ground that he has made himself liable to pay the attorney, a release to him by the attorney of "all fees, costs, and charges," is sufficient to render him competent. *Doe d. Dully v. Allbutt*, 131

2. If the counsel for a prosecution decline calling a witness whose name is on the back of the indictment, it is in the discretion of the Judge who tries the case, whether the witness shall or shall not be called, for the prisoner's counsel to examine him before the prisoner is called on for his defence. *Rex v. Bodle*, 186

3. If the witness be so called, the Judge will allow the examination of the witness to assume the shape of a cross-examination, but will not allow the prisoner's counsel to call any witnesses to contradict him. *Ibid.*

4. If a witness refresh his memory from entries in a book, the opposite counsel may cross-examine on those entries, without making them his evidence, and the jury may see the entries if they wish to do so; but, if the opposite counsel cross-examine as to other entries in the same book, he makes them his evidence. *Gregory v. Tavernor*, 280

5. The stat. 3 & 4 Will. 4, c. 42, s. 26, does not make the drawer of an accommodation bill a competent witness for the defendant in an action by the indorsee against the acceptor. The defendant, therefore, cannot examine him without a release. *Burgess v. Cuttill*, 288

6. Where a witness for the prosecution, in a case of felony at the Old Bailey, on being asked to repeat an answer which she had previously given, before the whole of it had been taken down, omitted what the prisoner's counsel thought an important part of it, and denied that she had ever uttered such part, the Judges allowed the short-hand writer of the Court, who had taken down the answer, to be examined as a witness, to shew whether the words had been used or not. *Rex v. Slater*, 334

7. A witness was asked, on cross-examination, whether he had not become bail for a witness previously examined. He replied, yes, and that he believed it was on a charge of keeping a gaming-house. In order to prevent any impression against the character of the party so accused, the Court, at the suggestion of counsel, allowed such party to be called up again, and asked whether the charge was in fact true or false. *Rex v. Noel*, 336

8. In an action on the case for injuring the plaintiff's wall by improperly digging a cellar near it, the workman who dug it is not made a competent witness for the defendant, by the stat. 3 & 4 Will. 4, c. 42, s. 26, and must therefore be released by the defendant before he can be examined. *Mitchell v. Hunt*, 351

9. In an action against a carrier for negligence in carrying a parcel, the carriers servant is not made a competent witness for the defendant by the stat. 3 & 4 Will. 4, c. 42, s. 26, and cannot be examined without a release. *Harrington v. Caswall*, 352

10. All the witnesses were ordered out of Court. A witness for the prosecution remained in Court. The Judge would not allow him to be examined. *Rex v. Wylde*, 380

11. It is no ground for rejecting a witness's evidence that he remained in Court after an order for all the witnesses to leave the Court, it is

merely a matter of observation on his evidence. *Cook v. Nethercote*, 741

12. Where a witness, on cross-examination, proves the handwriting of the opposite party to a paper, the counsel for such party has no right to see the paper to enable him to found an examination as to whether it was really the writing of his client or not. *Russell v. Rider*, 416

13. At a trial an interested witness was examined, on the attorney for the party examining him undertaking to give him a release. After the trial the attorney refused to release the witness:—*Held*, that the witness might compel the attorney to give him a release, but that this refusal was no ground for the Court granting a new trial. *Hemming v. Edwards*, 542

14. In an action for work and labour the defendant pleaded, that the "promise was made to the plaintiff and J. S., and not with the plaintiff alone." Replication—that the "promise was made to the plaintiff alone, and not to the plaintiff and J. S.:"—*Held*, that J. S. was a competent witness for the defendant to prove that the contract was entered into by the defendant with the plaintiff and himself jointly. *Davies v. Evans*, 619

15. Where, after the examination of witnesses to a fact on behalf of a prisoner, the Judge (there being no counsel for the prosecution) calls back and examines a witness for the prosecution, the prisoner's counsel has a right to cross-examine again, if he thinks it material. *Rex v. Watson*, 653

16. If a witness on the *voire dire* be asked if he is liable to pay the attorney, and he say that he is not, a letter written by him may be put into his hand, and after he has looked at it, the question may be put again. *Homan v. Thompson*, 717

17. Persons who have refused to pay toll traverse or a market toll are com-

petent witnesses, *ex necessitate*, for the defendant, in an action of debt by the lessee of such tolls, to which the general issue is pleaded. *Lancum v. Lovell*, 457

WOOLLEN MANUFACTURES.

In trespass against ten defendants for breaking the house of A. and taking his woollen yarn, the defendants may, under the general issue, shew that the yarn was afterwards condemned under the stat. 17 Geo. 3, c. 56, in order to make out that A. could have no property in it. But the condemnation of the yarn, unless the parties had a search warrant, will not justify the entering of a house. *Davis v. Nest*, 167

2. If yarn of a description liable to be condemned were found in the house of the plaintiff, magistrates have jurisdiction to condemn it under the statute, and to convict the plaintiff, although the yarn was not found on the execution of a search warrant previously granted; and, in an action by the plaintiff for taking it, the conviction is evidence for the defence, although it is founded on the evidence of one of the defendants. *Ibid.*

3. The general rule is, that where a conviction adapts the state of facts to the words of the statute, that is sufficient; therefore, where a conviction

on the statute stated that A. B. was convicted before the magistrates upon the oath of T. J., a credible witness, of having in his possession, in his dwelling-house, certain materials used in the woollen manufacture, suspected to be embezzled and purloined, to wit, &c., he not producing the party from whom he bought the same, or giving a satisfactory account, and then going on to adjudicate, is good. *Ibid.*

WOUND.

In criminal cases the definition of a wound is an injury to the person by which the skin is broken. *Moriarty v. Brooks*, 684

WRECK.

1. If Spanish dollars more than one hundred years old be found in the sands of a sea shore, it will be presumed that they came there by the loss of some vessel which was wrecked, although no part of any vessel be found near them. *Talbot v. Lewis*, 603

2. An ancient survey of a manor made before commissioners appointed by the lord of the manor, and a jury of the tenants of the manor, is admissible as evidence to shew the boundaries of the manor; but is not admissible as evidence of the lord's title to wreck. *Ibid.*

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